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The *Younger* Doctrine: Reconstructing Reconstruction

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I. Introduction

> The question for decision is whether the oft-challenged doctrine of *Ex parte Young* shall now be disapproved.
>
> —Town of Appomattox v. Grant
> 441 U.S. 102 (1979)

That language has not yet appeared in the *United States Reports*. The revolution in federalism it would announce, however, is already well advanced. In the last three Terms, the Supreme Court has developed the implications of *Younger v. Harris*[1] into a doctrine of devolution of judicial power to state courts, attaching to the *Younger* doctrine the same imperative dignity previously accorded substantive due process and the civil rights of blacks. Armed with that doctrine, the Court has moved with accelerating speed across a broadening front toward a reconstruction of the balance of judicial power in the federal system. Until recently this development remained entirely outside the range of public scrutiny and political debate, partly because the individual decisions lacked newsworthiness, and partly because the Court has rowed toward its object with muffled oars, avoiding

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1. 401 U.S. 37 (1971).

doctrinal statements of a kind whose ramifications would be clear even within the legal profession.[2]

Restrictions on the availability of federal equitable relief in civil liberties cases do not have the same direct and dramatic impact upon sensitive interests and discrete classes as decisions striking down segregation or legislative malapportionment. The cumulative impact of such restrictions, however, may work as profound a shift in the balance between state and federal power, and between judicial and political authority at the federal level. Concern with the wisdom of the shift and the propriety of this judicial initiative in restructuring the federal system is made more acute when, as now, the Court has elected a policy apparently inconsistent with legislative command, implemented in decisions just below the threshold of public attention, shielded from political accountability.[3]

The Court, in *Younger v. Harris*, embarked upon a policy of limiting federal judicial power to the advantage of the states, at the expense of federal civil liberties. The decisions advancing that policy were made possible by the Court's opinion in *Younger*, rather than by its precise holding. The opinion laid down a "detritus of undefined notions of comity, of equitable doctrines and of states'-rights rhetoric,"[4] that the Court poked at only intermittently in the next three Terms. In the 1974 Term, however, a new majority began to develop the potential of *Younger* and to use it to

2. The Court's actions have not escaped scrutiny in legal journals. The expanding literature includes: Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that 'Interfere' with State Civil Proceedings*, 29 STAN. L. REV. 27 (1976); Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U.L. REV. 841 (1972); Sedler, *Dombrowski in the Wake of Younger: The View From Without and Within*, 1972 WIS. L. REV. 1; Shaman & Turkington, Huffman v. Pursue, Ltd.: *The Federal Courthouse Door Closes Further*, 56 B.U.L. REV. 907 (1976); Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U.L. REV. 740 (1974); Zeigler, *An Accomodation of the* Younger *Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266 (1976); Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of* Hicks v. Miranda, 76 COLUM. L. REV. 508 (1976); Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, 12 HARV. C.R.-C.L.L. REV. 63 (1977); Comment, *Federal Injunctive Relief Against State Court Criminal Proceedings: From Young to Younger*, 32 LA. L. REV. 601 (1972); Note, *The New Federal Comity: Pursuit of* Younger *Ideas in a Civil Context*, 61 IOWA L. REV. 784 (1976).

3. Only recently, as the cumulative impact of the decisions of several Terms has come to be felt, have articles on the subject begun to appear outside of law reviews. *See, e.g.*, Davis, *A "Keep Out" Sign on the Courthouse Doors?*, 6 JURIS DOCTOR 31 (July-August 1976) (The author was losing party in Paul v. Davis, 424 U.S. 693 (1976)); *See* note 136 *infra*]; Lewin, *Avoiding the Supreme Court*, N.Y. Times, Oct. 17, 1976, § 6 (Magazine), at 31; Oelsner, *The Diminishing Right to Fight City Hall in Court*, N.Y. Times, April 11, 1976, § 4, at 9, col. 1; Lewis, *The Doors of Justice*, N.Y. Times, March 28, 1977, at 29, col. 5, and March 31, 1977, at A25, col. 1; Lewis, *No Process of Law, id.*, April 8, 1976, at 37, col. 1; *A Statement of the Board of Governors: The Burger Court's Efforts to Close the Federal Courthouse to Public Interest Litigants*, Society of American Law Teachers, Oct. 1976.

4. Hufstedler, *supra* note 2, at 867.

effect a radical subordination of federal to state courts as guarantors of federal civil liberties. In the Court's decisions in *Huffman v. Pursue, Ltd.*,[5] *Hicks v. Miranda*,[6] *Juidice v. Vail*,[7] and *Trainor v. Hernandez*,[8] the retreat sounded to the federal judiciary in 1971 has degenerated into a rout.

In *Younger* and subsequent cases, the Court has insisted that it is merely following established precedent in the pursuit of longstanding judicial and statutory policies. Clearly, however, the *Younger* line of cases has seriously undermined, if not sacrificed altogether upon the altar of "Our Federalism,"[9] the role of the federal courts as "the primary and powerful reliances for vindicating every right given by the Constitution,"[10] a role conferred by the "basic alteration in our federal system"[11] effected through the Reconstruction amendments and postbellum statutory reforms. *Ex parte Young*,[12] the very *Grundnorm* of post-Civil War federalism, may fall to the *Younger* doctrine even if the Court does not consciously intend it as a target. The considerations of equity and comity developed through decades by the Court to accommodate the tensions among state power, federal power, and individual rights, have been turned into a single, rigid commandment of federal judicial inaction that violates even such rules as equity and comity could be said to have contained. As the Court declared recently, "where a case is properly within [the scope of the *Younger* doctrine], there is no discretion to grant injunctive relief."[13] This rigidity has eliminated the discretionary balancing at the heart of equity.[14]

5. 420 U.S. 592 (1975).
6. 422 U.S. 332 (1975).
7. 430 U.S. 327 (1977).
8. 97 S. Ct. 1911 (1977).
9. Younger v. Harris, 401 U.S. 37, 44 (1971).
10. Zwickler v. Koota, 389 U.S. 241, 247 (1967) (emphasis in original) (quoting F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (1928)). Justice Brennan's opinion in *Zwickler* emphasized the radical alteration in federalism wrought by the post-Civil War Congress, noting that the prior policy of relying upon state courts to vindicate essential rights "was completely altered after the Civil War when nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers." 389 U.S. at 246. The Court noted that it was improper to deny a plaintiff the choice of a federal forum "merely because state courts also have the solemn responsibility, equally with federal courts," to protect and enforce federal rights. *Id.* at 248.
11. Mitchum v. Foster, 407 U.S. 225, 238 (1972). Since World War II, the Court has explicitly changed its view of the import of the post-Civil War enactments. *See, e.g.*, Justice Fortas's statement for a unanimous Court in United States v. Price, 383 U.S. 787, 801-06 (1966). For the shift in Justice Douglas's views, *compare* the dictum in his plurality opinion in Screws v. United States, 325 U.S. 91, 98 (1945), *with* his majority opinion in Monroe v. Pape, 365 U.S. 167 (1961). The evolution in Justice Douglas's thought was completed in his dissenting opinion to Younger v. Harris, 401 U.S. 37, 58, 61-63 (1971).
12. 209 U.S. 123 (1908).
13. Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 816 n.22 (1976).
14. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

No one who is mindful of decisions such as *In re Debs*[15] and *Dennis v. United States*[16] will suppose that federal courts have been uniformly courageous and resourceful in preserving federal civil liberties, or that state courts have never vindicated a federal right.[17] But one need not be fetishistic about the role of federal courts or about access to them to wonder what stern necessity of law or public order requires changes as extensive as the *Younger* doctrine imports, nor to wonder at the inadequacy of the rationale presented by the Court. Nothing in the *Younger* opinion discloses what brought forth the "imaginative enthusiasm"[18] on behalf of a peculiarly static vision of federalism that characterizes it. The history, policy, and precedent Justice Black relied upon, while not entirely made up for the occasion, were selected with care and used to construct a rhetorical scaffolding dangerously out of proportion to the somewhat modest holding. It is exactly that enthusiasm and lack of proportion, however, that has gotten out of control.

To grasp the substance and the dynamic of the *Younger* doctrine, it is necessary to examine first *Younger v. Harris* and then the doctrine as the Court has developed it in succeeding Terms. The Court's determination and direction may then appear with sufficient clarity to permit assessment of its performance and identification of the issues of power and of policy raised by the doctrine. If the Court really is doing something more than what "lazy judges do, who win the game by sweeping all the chessmen off the table,"[19] it is important to know what that may be.

II. The Birth of a Doctrine

A. Younger v. Harris

John Harris was indicted under California's Criminal Syndicalism Act[20] for distributing leaflets advocating public ownership of the means of industrial production. He sought dismissal of the indictment on federal

15. 158 U.S. 564 (1895). *See generally* A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW (1960); A. LINDSEY, THE PULLMAN STRIKE (1942), for accounts of the role of federal courts as upholders of "a neofederalist conservatism."

16. 341 U.S. 494 (1951).

17. *See, e.g.*, State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975), *discussed in* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *Cf.* Michigan v. Mosley, 423 U.S. 96, 120-21 (1975) (dissenting opinion of Brennan, J.) (state courts imposing greater protection for criminal defendants than required by U.S. Constitution as matters of state law). *But see* State v. Phillips, 540 P.2d 936, 938 (Utah 1975) (first amendment to U.S. Constitution is inapplicable to the states).

18. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 83 (9th ed. 1975).

19. L. Hand, *Mr. Justice Cardozo*, 39 COLUM. L. REV. 9, 10; 52 HARV. L. REV. 361, 362; 48 YALE L.J. 379, 380 (1939).

20. CAL. PENAL CODE §§ 11400, 11401 (West 1970).

constitutional grounds and, failing that, applied to the state appellate courts for a writ of prohibition. When this effort was also unavailing, he brought suit in federal district court under section 1983 of the Civil Rights Act, seeking to have the district attorney enjoined from prosecuting him on the grounds that the Syndicalism Act was unconstitutional on its face and that its very existence inhibited him in the exercise of his right to freedom of speech.[21] A three-judge court, relying on *Dombrowski v. Pfister*[22] and *Cameron v. Johnson*,[23] found the Criminal Syndicalism Act void for both vagueness and overbreadth, and enjoined Younger from further prosecution of Harris under the Act.

Younger appealed, arguing that the district court was bound under *Whitney v. California*[24] to uphold the Act, and that the Act was constitutional on its face. At the Court's suggestion, California also argued that issuance of the injunction violated both judicial policy and the Anti-Injunction Act.[25] By the time of appeal, the Supreme Court had overruled the *Whitney* decision in *Brandenburg v. Ohio.*[26] The underlying question of substantive law had, therefore, been decided. Nevertheless, the remaining issue—the propriety of the district court's grant of equitable relief—required three oral arguments before the Court reached a decision.[27]

The Court expressly ignored the questions whether *Whitney* had been binding upon the district court and whether the California statute was

21. Younger v. Harris, 401 U.S. 37, 39 (1971).

22. 380 U.S. 479 (1965). *Dombrowski* was a suit by the Southern Conference Educational Fund, Inc., a civil rights group, against the Governor of Louisiana and other state officers in which plaintiffs sought declaratory and injunctive relief against threatened enforcement of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law. The three-judge district court did not view the allegations as presenting a claim of threatened irreparable injury sufficient to justify injunctive relief. The court also invoked the abstention doctrine. The Supreme Court, through Justice Brennan, reversed. The Court discerned a showing of irreparable injury in that a nonfrivolous challenge of a statute as an overly broad and vague regulation of expression asserts far more than an "injury other than that incidental to every criminal proceeding brought lawfully and in good faith." 380 U.S. at 489. The Court found abstention inappropriate, because of the allegations of bad faith enforcement of the statutes and because of the absence of a "readily apparent construction" appropriate for rehabilitating the statutes in a single prosecution. *Id.* at 490-92.

23. 390 U.S. 611 (1968). In *Cameron*, the Supreme Court found that enforcement of the Mississippi Anti-Picketing Law did not give rise to injury sufficient to satisfy the *Dombrowski* criteria.

24. 274 U.S. 357 (1927).

25. 28 U.S.C. § 2283 (1970). An additional question California put to the Court concerned the standing of three parties to Harris's suit who were not themselves indicted or prosecuted under the state act.

26. 395 U.S. 444, 449 (1969).

27. Most of *Younger's* companion cases required multiple arguments. Samuels v. Mackell, 401 U.S. 66 (1971), and Boyle v. Landry, 401 U.S. 77 (1971), were also argued three times; Dyson v. Stein, 401 U.S. 200 (1971), and Byrne v. Karalexis, 401 U.S. 216 (1971), were each argued twice; of the six cases, only Perez v. Ledesma, 401 U.S. 82 (1971), was decided on a single airing before the Court.

constitutional.[28] It also declined to consider the direct applicability of the Anti-Injunction Act to civil rights actions brought under section 1983. Instead the Court, through Justice Black, reversed the judgment below "as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."[29] The lower court's order could have been affirmed only on Harris's showing that irreparable injury would otherwise have resulted, and even "irreparable injury would have been insufficient unless it was 'both great and immediate.' "[30] The Court held that neither the "chilling effect" of a state statute allegedly vague or overbroad on its face, nor the burden of defending against a single state prosecution could be such an injury.

Justice Black intimated that an ingenious legislature might devise a statute so tainted that its bare existence would support a claim of irreparable injury.[31] In effect, however, he committed the Court to the proposition that a state statute alleged to be void on its face under the first amendment is a matter for consideration by state courts, not federal courts of equity, unless bad faith and harassment in the prosecution is also shown. Only a showing of prosecutorial bad faith and harassment could support a claim that "the threat to the plaintiff's federally protected rights [might] be one that cannot be eliminated by his defense against a single criminal prosecution."[32] In fact, no realistic basis for the grant of injunctive relief from pending prosecutions emerged from Justice Black's discussion, and the elements required to establish such a basis were not specified.[33]

28. 401 U.S. 37, 40-41 (1971).

29. *Id.* at 41.

30. *Id.* at 46.

31. *Id.* at 53-54, quoting his own opinion in Watson v. Buck, 313 U.S. 387 (1941), an early and singularly inapposite case defending state autonomy in economic regulation from federal interference on grounds of due process. *See* note 99 *infra*.

32. 401 U.S. at 46. Ironically, the Court cited *Ex parte* Young, 209 U.S. 123, 145-47 (1908), in support of its argument that the possibility of defending in a state criminal prosecution is sufficient protection, which forecloses federal challenge absent unusual circumstances such as bad faith. Justice Peckham had taken, however, a very different approach for the majority in *Ex parte Young* when he noted that "to impose upon a party interested the burden of obtaining a judicial decision . . . only upon the condition that if unsuccessful he must suffer imprisonment and pay fines . . . is, in effect, to close up all approaches to the courts . . . and therefore [is] invalid." *Id.* at 148.

For a view of the burdens of sustaining a defense more sympathetic than that indicated in *Younger*, see Breed v. Jones, 421 U.S. 519, 529-30 (1975) (Burger, C. J., for unanimous Court) (juvenile proceeding "imposes heavy pressures and burdens—psychological, physical, and financial—on a person charged"), and Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 512-13 (1972) (Powell, J., dissenting).

33. For discussion of the exceptions to *Younger*, see note 259 *infra*.

In Samuels v. Mackell, 401 U.S. 66 (1971), the most important of *Younger*'s companion cases, Justice Black, writing for the Court again, held that where criminal prosecutions were pending in state court at the time the federal suit was filed, declaratory relief could be granted

Such a tightening of the grounds for making an exception to the rule against federal interference with pending state prosecutions would not have been a dramatic doctrinal shift. In fact, Justice Black purported only to apply the proposition that "the normal thing to do when federal courts are asked to enjoin pending prosecutions in state courts is not to issue such an injunction."[34] If Justice Black's opinion actually had been confined to the situation of a pending prosecution presented in *Younger*, the decision would have represented little more than fine-tuning, perhaps portentous, of established doctrine.[35] The obvious authority for such an opinion would have been any of the Court's numerous prior decisions, such as *Ex parte Young*.[36]

Instead, Justice Black justified doing "the normal thing" in terms of "Our Federalism," a concept not limited to pending prosecutions that he found in the mists of history and the dreams of the Framers.[37] The cases he used to illustrate Our Federalism had nothing to do with *Younger*, because they did not involve pending prosecutions. Upon examination, those cases turn out to have nothing to do with Our Federalism either. If they really did

only upon the same showing of exceptional circumstances held in *Younger* to be a prerequisite for granting injunctive relief. "Ordinarily . . . the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injuction." *Id.* at 73. Since neither Harris nor Samuels had demonstrated that great and immediate irreparable injury would result if they were obliged to defend the state prosecutions, the Court held it improper for their requests for federal equitable relief to have been heard on the merits, much less to be granted.

To decide the case as to Harris, who was "actually being prosecuted," 401 U.S. at 42, when the federal suit was filed, Justice Black might simply have invoked the ancient maxim that equity will not enjoin a criminal prosecution. In Dombrowski v. Pfister, 380 U.S. 479 (1965), however, the Court had skirted the difficult problem of defining just when a prosecution is pending, and in Cameron v. Johnson, 390 U.S. 611 (1968), it appeared to have decided, *sub silentio*, that equity could intrude in pending state prosecutions.

The state proceedings in *Dombrowski* might well have been pending by the Court's subsequent standards, if not those applicable at the time. The Court was sufficiently vague on the point to permit the lower court and plaintiffs in *Younger* to infer that pendency was no longer an absolute bar to injunctive relief. In *Cameron* the fact of pendency did not prevent the Court from reaching the merits, although relief was denied. At no point, however, did the *Younger* Court contend with *Dombrowski* as a decision arguably authorizing an injunction of pending criminal proceedings. Justice Black, writing of *Dombrowski*, referred only to "the circumstances presented in that case." 401 U.S. at 47.

34. 401 U.S. at 45.

35. It might then have been sufficient to say of *Younger* that the Court expressed hostility to facial attacks on state statutes, repudiated the "chilling effect" approach of *Dombrowski*, and rejected an implication of *Cameron* that the strict prohibition on interference with pending prosecutions might be relaxed.

36. 209 U.S. 123 (1908). The Anti-Injunction Act, 28 U.S.C. § 2283 (1970), another possible source of authority, was not available to Justice Black at the time of *Younger* because the Court had not resolved the relation between the Act and the Civil Rights Act, 42 U.S.C. § 1983 (1970). *See* text accompanying notes 134-39 *infra*.

37. 401 U.S. at 44. *See* text accompanying notes 124-27 *infra*.

stand for the propositions Justice Black claimed to derive from them, they would have supported a general rule of federal nonintervention in any state proceeding, civil or criminal, pending or threatened. True, Justice Black expressly disclaimed any intention to express a view of "the circumstances under which a federal court may act when there is no pending prosecution in a state court at the time the federal proceeding is begun."[38] It is plain, however, from the broad sweep of his arguments and from his imaginative use of inapposite authority, that the disclaimer was disingenuous, and after the third argument of *Younger*, the other Justices knew it. They were placed in an awkward position, however. The Court's actual holding was narrow, and not obviously out of line with prior decisions. Although the language was unduly broad, it was difficult to dissent from points Justice Black claimed he had not made. Only Chief Justice Burger and Justice Blackmun were entirely content with both the result and the opinion, and only Justice Douglas dissented. The five Justices who concurred separately, with varying degrees of uneasiness,[39] may have consoled themselves with the hope that there would be time enough to fight if the rhetoric of *Younger* were sought to be applied to different facts in a later case.[40] That hope, however, was illusory. Whatever Justice Black's strategy may have been,[41] he rewrote history to accomplish it. The restrictive picture of federal equity that resulted was not limited to the facts that generated it, and the *Younger* doctrine proved impossible to confine.

B. The Abuse of Precedent in Younger

"The normal thing" for federal courts to do, according to Justice Black, was to grant equitable relief only on a showing of "irreparable loss" "both great and immediate," which, consistently with "settled precedent," could be supported only by demonstrating bad faith and harassment, the

38. 401 U.S. at 41.

39. Justices Brennan, Marshall, and White concurred in the result only, subscribing to Brennan's laconic separate opinion which placed as much distance as possible between them and the Court's opinion. *Id.* at 56-58. Justices Stewart and Harlan, who concurred in the opinion and the result, nevertheless felt obliged to add a separate concurrence making it plain that they subscribed to Justice Black's disclaimer of any intention to frame a rule applicable beyond the facts before them, whether Black genuinely intended the disclaimer or not. *Id.* at 54-56.

40. *Cf.* Huffman v. Pursue, Ltd., 420 U.S. 592, 613-14 (1975) (Brennan, J., dissenting) (*Younger* as culmination of tradition of federal noninterference in pending state prosecutions, a tradition inapplicable to civil proceedings). Since the exceptions stated in *Younger* applied to pending criminal prosecutions, it might have been tempting to suppose that they amounted to a disclaimer of any further restriction on federal equitable power to interfere where state proceedings were merely threatened or were civil in nature.

41. Perhaps Justice Black, who did not participate in *Dombrowski*, wished to make certain that the test in that case did not spill over beyond its facts, and wrote *Younger* as a counterpoise.

"usual prerequisites."[42] Such, Justice Black asserted, was the rule at the time of *Douglas v. City of Jeannette*[43] in 1943, and that, he concluded, was "where the law stood when the Court decided *Dombrowski v. Pfister*."[44] Justice Black attempted to prove his point by relying on broad language in such relatively obscure and inapposite decisions as *Fenner v. Boykin*,[45] and by ignoring a body of better-known cases in which the Court regularly reached the merits of suits for injunctive and declaratory relief. In some of these cases, relief was granted without any mention of the values of Our Federalism; in others, those values were offset by showings of irreparable injury quite different from those that Justice Black claimed had always been necessary.[46]

Ex parte Young,[47] for example, the leading case for the rule of nonintervention in pending criminal proceedings, is also the leading case for intervention absent pending proceedings. In *Ex parte Young*, the Court permitted the enjoining of a state criminal prosecution—filed the day after the federal suit was filed—that would have compelled the Northern Pacific Railroad and others to defend against criminal charges in a Minnesota court. The Minnesota attorney general had assured defendants that there would be only one prosecution, and hence no burden of multiple suits. The magnitude of the sanctions provided by the state statute, however, as well as the Court's solicitude for railroads, led to a holding that a sufficient showing of irreparable harm had been made, and the threatened prosecution could be enjoined.[48] *Ex parte Young* became the most celebrated instance of federal equitable interference, largely because of the manner in which the Court finessed the eleventh amendment for the sake of the fourteenth amendment's protection of private property.[49] *Young* also marked the Court's emergence

42. 401 U.S. at 46.

43. 319 U.S. 157 (1943).

44. 401 U.S. at 47.

45. 271 U.S. 240 (1926). The other cases cited in *Younger* were Douglas v. City of Jeannette, 319 U.S. 157 (1943); Williams v. Miller, 317 U.S. 599 (1942), Watson v. Buck, 318 U.S. 387 (1941); Beal v. Missouri Pac. Ry., 312 U.S. 45 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935). With the exception of *Williams*, a one-sentence per curiam decision, these cases were the same ones cited by Justice Brennan in *Dombrowski, see* 380 U.S. at 485 n.3. It appears that Justice Brennan gave those cases away as the strongest that could be raised against injunctive relief, only to override them. Perhaps, Justice Black, not having participated in *Dombrowski*, revived them in *Younger* with a view to relitigating the point.

46. *See generally* Wechsler, *supra* note 2, at 778-865.

47. 209 U.S. 123 (1908). Justice Black acknowledged the case in passing only as a narrow judicial modification of the Anti-Injunction Act. 401 U.S. at 43.

48. 209 U.S. at 162. The relative formality of the distinction drawn by the Court between threatened and pending prosecutions has been widely noticed and criticized. *See, e.g.*, Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 375 (1930).

49. In *Ex parte Young* Justice Peckham found that "the prosperity of the railroads and the country is most intimately connected." 209 U.S. at 166.

from a period of restraint in the exercise of its equity jurisdiction as the habits of the old federalism were accommodated to the powers of the new nationalism, especially the grant of federal question jurisdiction in 1875.[50]

In the years between *Young* and *Fenner v. Boykin*,[51] the earliest case relied upon by Justice Black, the Court upheld dispositions on the merits by lower federal courts of anticipatory challenges to state statutes.[52] Among the most instructive of these cases was *Terrace v. Thompson*,[53] in which the Court affirmed the issuance of an injunction to restrain threatened enforcement of a Washington statute prohibiting the transfer of interests in realty to

It was hardly the first time the Supreme Court had affirmed the exercise of equitable jurisdiction in order to protect railroads from state rate regulation. *See, e.g.*, Smyth v. Ames, 169 U.S. 466 (1898). In fact, federal intrusion had become so onerous that a year before the Court decided *Young*, a convention of state attorneys-general adopted a resolution recommending that Congress prohibit federal courts from restraining state officers and administrators from enforcing state laws or the orders of commissions. *See* Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L. J. 1169, 1191 n.107 (1933).

50. The leading case of the earlier phase was *In re* Sawyer, 124 U.S. 200 (1888). *Sawyer* was a habeas proceeding brought within the Court's original jurisdiction by the mayor and council of Lincoln, Nebraska, who were jailed for contempt of a federal court order forbidding them to remove a police court judge who had accused them of selling protection to gamblers and pimps. Justice Gray, writing for the Court, declared that equity jurisdiction, unless enlarged by express statute, extended to the protection of property rights only, and that it was powerless to intervene in criminal proceedings. The majority (with Justice Field concurring) distinguished sharply between criminal cases, which were beyond the ambit of equity, and civil proceedings, which were held beyond the federal jurisdiction because of the Anti-Injunction Act. Federalism figured in the opinion only as a support for a third basis for denying relief, the Court's statement that injunctions could not issue to stay nonjudicial proceedings relating to the appointment or removal of public officers. It is hard to say what is holding and what is dictum among those three grounds of decision, because the Court did not commit itself to a characterization of the case nor to any single *ratio decidendi*. The injunction was held void, however, for want of "jurisdiction or power," *id.* at 221, in the lower court to grant it. Anticipating one of the major confusions of federal equity, Justice Harlan dissented, rejecting the notion that jurisdiction was at issue. He maintained instead that whether the lower court could properly grant the police judge the relief he sought "is not a question of jurisdiction . . . It is rather a question as to the exercise of jurisdiction." *Id.* at 224. This issue was finally resolved in Smith v. Apple, 264 U.S. 274 (1924), in which a unanimous court rejected the construction of the Act as a jurisdictional statute.

In the two decades between *Sawyer* and *Ex parte Young*, the Court gradually refined some of the problems created by its expanded powers, joining the issues more clearly than it had been able to do in the then-novel circumstances of *Sawyer*. In Harkrader v. Wadley, 172 U.S. 148, (1898), for example, the Court, in the context of a habeas proceeding, ignored *Sawyer*'s distinction between civil and criminal proceedings and suggested that the court first securing jurisdiction over a case, whether state or federal, should hold it exclusive of the other court system. In 1903, five years after *Harkrader*, the Court seemed to say that federal equitable jurisdiction invoked to protect property from invasion through an allegedly unconstitutional law cannot be ousted even by a pending criminal prosecution in state court. Davis & Farnum Mfg. Co. v. City of Los Angeles, 189 U.S. 207, 218 (1903).

51. 271 U.S. 240 (1926).

52. The most celebrated case is probably Pierce v. Society of Sisters, 268 U.S. 510 (1925), in which Justice McReynolds, two years before the effective date of the act, sustained a challenge to a state statute that would have made public school attendance compulsory in Oregon.

53. 263 U.S. 197 (1923).

noncitizens. The state attorney general had moved to dismiss the suit on the ground that plaintiffs could raise their consitutional claims by way of defense to state prosecution. The Court noted that although "the unconstitutionality of a state law is not of itself ground for equitable relief in the courts of the United States,"[54] irreparable injury was adequately made out when, as here, plaintiffs would not only have to risk fine, imprisonment, and forfeiture of land, but would also need to find an alien willing to share the risk in order to make their constitutional claim. "They have no remedy at law which is as practical, efficient, or adequate as the remedy in equity."[55] Plaintiffs did not allege bad faith and harassment, and the Court did not speak of comity within the federal system as a discrete value to be weighed against their claim. It was sufficient that the federal equitable remedy was quicker and easier than the remedy at state law, whose criminal sanctions were severe and whose constitutionality was obviously questionable.[56]

Terrace became a leading case for the proposition that though a bill in equity could not be sustained when "the question may be tried and determined as fully in a criminal prosecution under the statute as in a suit in equity,"[57] nonetheless "it is settled that 'a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property.' "[58] The cases disposed of under that generously phrased distinction to the general rule covered a wide range of

54. *Id.* at 214.

55. *Id.* at 215. The facts of *Terrace* establish it as a perfect situation for declaratory relief, but at the time federal equity knew only injunctions.

56. The Court affirmed the dismissal of the suit, however, because the statute violated neither the United States Constitution nor the 1911 treaty with Japan. *Id.* at 216-24.

In Local Loan Co. v. Hunt, 292 U.S. 234 (1934), in which the jurisdiction of the federal court was established by its prior adjudication of the plaintiff as a bankrupt, the Supreme Court found it proper to enjoin a creditor from pursuing a claim against the bankrupt in state court. The Court acknowledged that the municipal court was competent to try the case and that the bankrupt federal respondent could have intervened in the state proceedings for a determination of the effect of his bankruptcy decree on the creditor's claim at state law. Lower state courts, however, were bound by a decision of the state supreme court adverse to the bankrupt's defense. The Court observed that:

> The alternative of invoking the equitable jurisdiction of the bankruptcy court was for respondent to pursue an obviously long and expensive course of litigation, beginning with intervention in a municipal court and followed by successive appeals through the state intermediate and ultimate courts of appeal, before reaching a court whose judgment upon the merits of the question had not been predetermined.

Id. at 241. Those circumstances were sufficiently "unusual" to support the district court's exercise of its equity jurisdiction. In a more recent case, however, the Court dismissed a plaintiff's contention that exhaustion of state appellate remedies would be futile, owing to a fresh ruling on point by the state supreme court saying, "courts sometimes change their minds." Hicks v. Miranda, 422 U.S. 332, 350 n.18 (1975).

57. Packard v. Banton, 264 U.S. 140, 143 (1924).

58. *Id.* (quoting Truax v. Raich, 239 U.S. 33, 37-38 (1915) and citing *Terrace*).

property claims.[59] Plaintiffs did not always prevail on the merits, but the Court, under the spell of substantive due process, had no difficulty in reaching the merits when vindication of a claim of property rights would otherwise require defense to a state criminal prosecution. The striking thing about these cases is the exclusivity of the Court's focus upon the dimension of its equitable powers, independent of considerations of federalism or comity. Those values, exalted in *Younger*, played so limited a role that the Court sometimes failed to distinguish between federal and state proceedings in discussing the general rule of equitable nonintervention and the circumstances adequate to support an exception.[60] One case declared the Anti-Injunction Act to be merely a rule of comity the federal courts were free to disregard if following it would "materially hamper . . . discharge of duties clearly cast upon them by the Constitution and the laws of Congress."[61]

The Court was not writing, therefore, on a clean slate in 1926 when it decided *Fenner v. Boykin*,[62] the leading case offered by Justice Black. In *Fenner*, a Georgia grand jury investigation of a cotton futures "claiming" company indicated that "arrests by the sheriff were likely to ensue."[63] The three-judge district court, treating the case as one of threatened rather than pending prosecution, assumed jurisdiction pursuant to *Ex parte Young*[64] and found that the Anti-Injunction Act did not bar relief, but that the standards for granting equitable relief were not met. On appeal, Justice McReynolds, writing for the Court, accepted the lower court's findings of fact and jurisdictional rulings and, reaching the merits as the court below had done, found that no adequate showing of irreparable injury had been made. Although Justice McReynolds expressed concern about avoiding unnecessary interference with state law enforcement, he did so in the language of equity. The most that can be said for *Fenner* is that it represents one line of cases pertinent to the questions in *Younger*.[65]

59. At various times the Court held it not a deprivation of property to require a dentist to appear before a state examining board, Douglas v. Noble, 261 U.S. 165 (1923); to oblige New York cab drivers to carry insurance or post a bond, Packard v. Banton, 264 U.S. 140 (1924); or to require Kosher and non-Kosher meats to be labelled correctly, Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925).

60. *See* Kennington v. Palmer, 255 U.S. 100, 101 n.1 (1921) (citing Adams v. Tanner, 244 U.S. 590, 592 (1917)).

61. Wells Fargo Co. v. Taylor, 254 U.S. 175, 183 (1920). *See also* Taylor & Willis, *supra* note 49, at 1189; note 149 *infra*.

62. 271 U.S. 240 (1926).

63. 3 F.2d 674 (N.D. Ga. 1925).

64. *Id.* at 676. Justice Black invoked *Fenner*, however, as the standard for pending prosecutions. *See* note 45.

65. Opponents of the Court's expansionist interpretation of its injunctive powers—students and colleagues of Professor Felix Frankfurter, for the most part—expressed the hope that *Fenner* promised the new and more restrained approach Justice Black claimed it had delivered

If *Fenner* was taken to raise the hurdle for injunctive relief, the Court lowered it almost immediately in *Cline v. Frink Dairy Co.*[66] The *Cline* Court indicated that both imminent and future prosecutions could be enjoined and that the statutes involved could be invalidated. The immunity of pending prosecutions from the reach of federal equity hardly represented a major inconvenience to federal chancellors or federal suitors. During the activist period following *Cline*, the Court's decisions did not address the reasons for the exception of pending prosecutions—an exception that continued to be honored as "the rule." Citation to *Ex parte Young* or any of the subsequent cases citing it was sufficient to make a point not generally contested. The Court did articulate several considerations to be weighed in determining the merits of an equitable bill, including the possibility of multiple suits in state court,[67] the burdensomeness of sanctions that could be imposed under the challenged state statute,[68] the magnitude of the property interest asserted,[69] the speed with which definitive relief could be obtained

in *Younger*. *See, e.g.*, Isseks, *Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials*, 40 HARV. L. REV. 969, 986 (1927); Taylor & Willis, *supra* note 49, at 1190-91; Warren, *supra* note 48, at 346. *See also* Lockwood, Maw & Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 443-44 (1930).

The language of *Fenner*, however, worked no magical transformation in equity jurisprudence, and the decision was normally cited only ritualistically as illustrative of the general rule that federal courts should exercise their equitable *discretion* with a *heightened sensitivity* to the delicacy of integrating federal equitable power and state law administration. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 489 (1965); Stefanelli v. Minard, 342 U.S. 117, 121 (1951); Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941); Pennsylvania v. Williams, 294 U.S. 176, 185 (1935). *Fenner* led a relatively quiet life until Justice Black took it off the shelf in 1971.

66. 274 U.S. 445 (1927). The Court in *Cline* declared a Colorado antitrust statute unconstitutional and enjoined its future enforcement, saying that plaintiffs' affidavits "present a case in which the question of the validity of the Act under which, if invalid, great injuries to properties and business are being unjustly inflicted, should be promptly settled." *Id.* at 452. The "great" injury appeared to be the threat of open competition to plaintiffs' $100,000 investment in their business. As to prosecutions actually pending against plaintiffs, however, the Court invoked the dictum of *Ex parte Young* that equity was subject to a per se rule against enjoining pending prosecutions, apparently without regard to the magnitude or imminence of the injury alleged. *Id.* at 453 (citing *Fenner*); *see* Warren, *supra* note 48, at 375. The lower court's injunction of the pending proceedings was reversed. The statute under which the prosecutions were brought, however, had been declared unconstitutional, and future prosecutions were prohibited. Under the circumstances, the stay was hardly necessary. Indeed, prosecutorial persistence under those conditions might be urged upon the Court as evidence of bad faith and harassment.

67. Attorney General Young's representation that he would bring but a single prosecution did not avail in *Ex parte Young*, largely because of the heavy penalties provided in the challenged statute. On the other hand, the Court in DiGiovanni v. Camden Ins. Ass'n, 296 U.S. 64 (1935), refused to find the burden of defending two civil actions sufficient *alone* to invoke equity jurisdiction.

68. Spielman Motor Sales v. Dodge, 295 U.S. 89 (1935); Terrace v. Thompson, 263 U.S. 197 (1923); *Ex parte* Young, 209 U.S. 123 (1908).

69. *See* Spielman Motor Sales v. Dodge, 295 U.S. 89 (1935); Cline v. Frink Dairy Co., 274 U.S. 445 (1927).

in state proceedings,[70] and the adequacy of the remedy available on the law side of the federal court with statutory jurisdiction over plaintiff's case.[71] Adequacy of the remedy at state law was not otherwise a proper consideration.[72]

Beginning with the railroad rate cases in the 1890's, and continuing with claims for relief from state economic regulation through the 1930's, the Court used its equitable power as an arm of substantive due process to protect property rights by enjoining threatened state proceedings and invalidating state laws with criminal sanctions.[73] The existence of statutory jurisdiction, together with the Court's confidence in its role as the watchdog of substantive due process, combined to produce rationales for equitable intervention in state affairs rather than the elaboration of considerations such as federalism and comity, which would counsel restraint. When equitable relief was denied, it was denied on the grounds that statutory jurisdiction did not exist,[74] or that plaintiff's demonstration of irreparable injury to a property interest was inadequate to invoke equity jurisdiction at all,[75] or, if adequate to invoke the jurisdiction, was still not adequate to warrant issuance of an injunction.[76] While Justice Black's picture of the period encourages the inference that the Court reached the merits of claims for injunctive relief only in the exceptional case, even when state proceedings were not pending, the actual situation was nearly the opposite. Injunctions were granted with sufficient regularity that when the Court upheld lower-court dismissals of suits in equity in several cases in the 1920's, some

70. *See* Local Loan Co. v. Hunt, 292 U.S. 234 (1934); Cline v. Frink Dairy Co., 274 U.S. 445 (1927).

71. *See* DiGiovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64 (1935).

72. *See id.*; Smyth v. Ames, 169 U.S. 466 (1898).

73. The steady fare of property claims involved in the cases prior to Hague v. CIO, 307 U.S. 496 (1939), is not attributable solely to the discredited, but still venerable, maxim that equity protected only rights in property. *See* Wechsler, *supra* note 2, at 746-47, and sources cited therein. It was not until 1925 that the Court found the first amendment applicable to the states. Gitlow v. New York, 268 U.S. 652 (1925). The parameters of the federal protection of civil liberties did not emerge at all until the Holmes-Brandeis dissents of the 1920's began to have an effect on the majority, and to find their way into the Court's opinions. *See, e.g.*, DeJonge v. Oregon, 299 U.S. 353 (1937), and Herndon v. Lowry, 301 U.S. 242 (1937). The merits are never far beneath the surface in equity; decade after decade, it is the most vexatious question of the period that comes to the federal court for equitable disposition. The railroad rate cases, the Jehovah's Witnesses cases in the 1940's, black civil rights activism in the 1950's and early 1960's, and political dissidents such as Harris and "purveyors of pornography" in the 1970's, brought the most intractable public issues of their eras to the Court.

74. *See, e.g.*, Healy v. Ratta, 292 U.S. 263 (1934). *Cf.* Hague v. CIO, 307 U.S. 496 (1939) (district court did not have jurisdiction under precursor of 28 U.S.C. § 1331(a), but did have jurisdiction under forerunner of 28 U.S.C. § 1343(3)).

75. *See* Spielman Motor Sales v. Dodge, 295 U.S. 89 (1935); Fenner v. Boykin, 271 U.S. 240 (1926).

76. *See* DiGiovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64 (1935).

commentators found it remarkable that the Court had sustained the exercise of discretion to *deny* relief.[77]

Justice Black maintained that Our Federalism represented a system "in which there is sensitivity to the legitimate interests of both State and National Governments . . . ."[78] But the Court's exercise of its equitable powers for much of this century reflected no more sensitivity to the interests of state governments than did the doctrines of substantive due process, which equity served as a handmaiden. The exercise of equity jurisdiction entailed only limited consideration of comity and federalism until, with the wane of substantive due process, a corresponding need emerged to curb the weapons the Court had formerly employed to enforce it. The seven years between *Nebbia v. New York*[79] and *United States v. Darby*[80] saw the decline and demise of substantive due process in economic regulation. During this period the Court gradually introduced into its equity jurisprudence a notion of the public interest to be weighed explicitly against claims of private proprietary rights in determining whether a case came within the equitable jurisdiction of the federal courts. Federalism was a component of that public interest. With some backing and filling, the Court constructed a genuine balancing test, adding an interest in state autonomy to the scale on the side of equitable restraint.

This introduction of federalism into the calculus of equity[81] may be traced most clearly in the opinions of Justice Stone.[82] In *Matthews v. Rodgers*,[83] for example, Justice Stone wrote that if plaintiffs had no alternative but to refuse payment of an allegedly unconstitutional tax, and thereby subject themselves to civil and criminal penalties, "the resulting injury to their business will be irreparable and can be avoided only by resort to equity to prevent the threatened wrong."[84] State procedures seemed to allow payment of the tax under protest and a subsequent action at law in the state

77. *See* Taylor & Willis, *supra* note 49, at 1189-90, 1194; Isseks, *supra* note 65, at 986.
78. 401 U.S. at 44.
79. 291 U.S. 502 (1934).
80. 312 U.S. 100 (1941).
81. Perhaps re-introduction would be a better word; the notion was still lively enough at the time of *Ex parte Young* in 1908 to animate the first Justice Harlan's passionate essay in dissent, whose tone is recaptured by Justice Black in *Younger*. The substance was revived by Justice Rehnquist in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), *see* text accompanying notes 141-200 *infra*.
82. Justice Stone had grappled with equity as a law professor at Columbia. Professor Alpheus Mason, in his biography of Stone, wrote that "Holmes endorsed Stone's adroit manipulations of equity doctrine" in Jenkins v. National Surety Co., 277 U.S. 258 (1928), with a note expressing his " 'respect for one who can dance the sword dance.' " A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 248 (1956).
83. 284 U.S. 521 (1932).
84. *Id.* at 526.

courts to recover the payment. According to Justice Stone the adequacy of that procedure to protect the federal right had to be gauged in light of "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts . . . ."[85] Using that standard, the Court struck the balance against plaintiff, remitting him to his remedy at state law. The "scrupulous regard" for comity emphasized in *Matthews* had once been a staple of the rhetoric of federal equity, but the analytic structure developed by the Court in the previous fifty years did not assign it a place on the scale. *Matthews* presented the Court with a favorable opportunity to put substance in the rhetoric, because of the special deference attaching to state autonomy in matters concerning taxation and revenue. The tension articulated in *Matthews* between claims of federally protected property rights and the "rightful independence of state governments" permitted federal equity to serve as a device for mediating between two opposed, identifiable interests, rather than as merely a weapon for the vindication of private rights.[86] The approach taken in *Matthews* may have been a welcome alleviation of the friction occasioned by federal interference with state tax collections, but it contained a significant conceptual problem. Consideration of the state remedy was, in theory, not only irrelevant, but inconsistent with the statutory grant of federal jurisdiction. Only the adequacy of the federal legal remedy would defeat federal equity jurisdiction.[87] The Court needed a legitimating rationale for considering the state remedy, or it would be vulnerable to the objection that it disregarded the congressional command. If equitable jurisdiction could always be established merely by showing the inadequacy of the federal remedy at law, however, the Court would find it difficult to limit federal equity powers. It would be even more difficult for the Court to give a coherent justification for refusing to exercise those powers in a particular case.[88]

The Tax Injunction Act of 1937[89] provided the color of statutory legitimacy necessary to allow the *Matthews* analysis to expand beyond its narrow factual limits. The Act—which prohibited federal injunction of state

85. *Id.* at 525.

86. Writing in 1930 about the use of federal injunctions to test the constitutionality of state statutes, three commentators found that "[a]t stake are the pride and public policy of the state, and the interests, adverse and beneficial, of the individuals affected." Lockwood, Maw & Rosenberry, *supra* note 65. Arguing that it was desirable to transfer cases to state courts "so far as may be consistent with the protection of the rights of litigants," *id.* at 454, they proposed a statutory alteration in the then-existing equity rules that would have required federal judges to ascertain whether state remedies were "adequate by federal standards" before assuming jurisdiction over a claim for injunctive relief against state action. *Id.*

87. *See* note 108 *infra*.

88. The awkwardness of the innovation, without an adequate supporting rationale, was evident in Stone's opinion in Atlas Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563 (1938).

89. Ch. 726, 50 Stat. 738 (1937) (current version at 28 U.S.C. § 1341 (1970)).

tax cases "where a plain, speedy and efficient remedy may be had in the courts of such State"[90]—appeared to ratify the *Matthews* Court's rationale for discretionary refusal of relief, and although the express ratification did not go beyond tax injunctions, the Court took the Act as an indication of a broader affirmation.

The liberation of the rationale may be observed in *Great Lakes Co. v. Huffman*.[91] In *Great Lakes* the district court had issued a declaratory judgment that the tax provisions of Louisiana's Unemployment Compensation Law[92] were constitutionally applied. When the case came to the Supreme Court on certiorari, two other cases before the Court raised the identical substantive question on appeal from state courts. After reaching the merits in the state cases and upholding the constitutionality of the statutes,[93] the Court held that the district court in *Great Lakes* should not have entertained the suit for declaratory relief on the merits. Although there was jurisdiction to hear and decide the claim for declaratory relief, the district court, exercising its equitable discretion, should not have done so.

Building upon *Matthews*, Chief Justice Stone noted the traditional reluctance of federal courts to interfere with the collection of state taxes when state law afforded an adequate remedy.[94] That reluctance was supported by the notion elaborated in cases following *Matthews* that equity may "in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest [as long as] it reasonably appears that private interests will not suffer."[95] In *Great Lakes*, as in *Matthews*, the public interest was identified with the state's freedom in handling its legitimate affairs, such as the levy and collection of taxes. A Louisiana protest provision similar to that in *Matthews* furnished reasonable assurance that the asserted private interest would not suffer if federal relief were withheld. Stone noted that although the Tax Injunction Act did not control the issue in *Great Lakes*, congressional ratification of the Court's balancing of equity and comity in tax injunction cases had implicitly approved the discretionary denial of equit-

90. *Id.*

91. 319 U.S. 293 (1943). Justice Black cited it as a controlling example of the applicability of Our Federalism to declaratory judgments.

92. Act 92 of 1936, as amended by Act 64 of 1938, Act 16 of First Extraordinary Session of 1940, and Acts 10 and 11 of 1940 (current version at LA. REV. STAT. ANN. § 23:1471 (West 1964)).

93. Standard Dredging Co. v. Murphy, 319 U.S. 306 (1943).

94. 319 U.S. at 297 (citing Matthews v. Rodgers, 284 U.S. 521 (1928)).

95. Great Lakes Co. v. Huffman, 319 U.S. at 297-98. *See also* DiGiovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 69 (1935), and Pennsylvania v. Williams, 294 U.S. 176, 185 (1935).

able relief on the same balancing of interests in other situations. Since declaratory relief was equitable in nature and the considerations of public interest in *Great Lakes* were the same as those in *Matthews*—comity and state taxes—the Court held that the adequacy of state remedies could be considered to determine whether the private interest would suffer if declaratory relief were withheld.[96] State remedies having been placed on the scale, the balance tipped against relief.

Although inadequacy of the federal remedy at law remained the prerequisite to federal equitable jurisdiction, adequacy of state remedies could be considered in determining whether there was *sufficient likelihood of irreparable injury*. Thus comity was piled on the back of equity and brought into the calculus in a defensible and explicit fashion.[97] As the test emerged from the transitional period of the 1930's and '40's, federal judges were required to scrutinize the alleged irreparability of injury to the asserted property right and the practical efficacy of available state remedies.[98]

The cases from this period relied upon by Justice Black in *Younger* are not pertinent to the narrow question of pending prosecutions he purported to address. The use he made of these cases, congenial enough for his purposes, resulted in an inaccurate portrayal of federal equity practice.[99] In fact,

96. 319 U.S. at 297.

97. Several years before *Matthews* was decided, Charles Warren wrote that as

> [T]he equitable jurisdiction of the federal courts . . . is based on the effect of . . . [enforcement of allegedly unconstitutional state statutes] upon property rights, through excessive and oppressive penalties, or through possibility of multiplicity of suits causing irreparable damage, or through lack of proper opportunities for review, it is open to the states, by changes in the provisions of their statutes, to remove this basis for the exercise of equitable jurisdiction by federal courts . . . .

Warren, *supra* note 48, at 377. Warren also cited and quoted Professor Frankfurter's article in 58 NEW REPUBLIC 273 (1929) to the same effect, *supra* note 48, at 378 n.149.

98. *See, e.g.*, Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563 (1939); DiGiovanni v. Camden Ins. Ass'n, 296 U.S. 64 (1935); Pennsylvania v. Williams, 294 U.S. 176 (1935). *But cf.* Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 97 (1935) (no conventional irreparable injury, bill dismissed without the need of balancing the right asserted against any articulated public interest).

99. Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935), is a solid case for Justice Black's thesis, except that it was ambiguous with respect to pendency, it did not turn on any express concern with comity, and the right asserted in it was in property, not liberty. Beal v. Missouri Pac. Ry., 312 U.S. 45 (1941), however, fails to buttress the *Younger* doctrine because of plaintiffs' waiver of their claim of irreparable injury. The case presented problems of "colored" railroad workers infiltrating jobs reserved for whites and receiving compensation at the higher scale paid white workers. The issues were similar to those the Court encountered immediately thereafter in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

Williams v. Miller, 317 U.S. 599 (1942), is a one-sentence per curiam decision, difficult to milk for any doctrinal proposition. Watson v. Buck, 313 U.S. 387 (1941), an opinion by Justice Black, first appeared before the Court as Gibbs v. Buck, 307 U.S. 66 (1939), and the *Gibbs* decision sparked a dissent by Black that resembled a paraphrase of Harlan's dissent in *Young*. When *Buck* came up the second time, Justice Black, for the Court, couched the denial of equitable relief to a copyright claimant in terms of ripeness rather than threatened or pending prosecution. The hypothetical statute, "flagrantly and patently violative of express constitu-

during this period, the Court was not concerned solely with criminal cases nor with pending prosecutions in elaborating the parameters of equitable jurisdiction. Nor did questions of "bad faith" and "harassment" figure prominently in discussion. Instead, the challenge to the Court lay in developing a rationale incorporating the adequacy of state remedies as a determinant of federal equitable relief, in order to make equity conform more closely to the Court's noninterventionist role in state economic regulation.

As substantive due process was abandoned, however, claims of federally protected civil liberties began to reach the Court. Justice Stone suggested in footnote 4 of *United States v. Carolene Products Co.*[100] that the Court might adopt an interventionist posture in cases of state infringement of expressly protected civil liberties, while deferring to the states in economic matters. Some way had to be found to restrain equity in the latter area while preserving its flexibility in civil liberties cases.[101]

tional prohibitions in every clause, sentence and paragraph," *id.* at 402, which Justice Black exhumed as the remote contingency perhaps supporting an exception to *Younger*, originated in *Watson* in the context of standard irreparable injury analysis. Douglas v. City of Jeannette, 319 U.S. 157 (1943), is discussed at text accompanying notes 102-08 *infra*.

100. 304 U.S. 144, 152 n. 4 (1938).

101. For a sketch of Justice Stone's crucial role in this process, see MR. JUSTICE 238-245 (A. Dunham & P. Kurland ed. 1964).

Hague v. CIO, 307 U.S. 496 (1939), marks the divide between the two eras. In *Hague* officials of Jersey City had been employing various coercive means, including arrests and forcible expulsions, to enforce various city ordiances restricting assembly and distribution of leaflets against proselytizers of the Committee for Industrial Organization. Plaintiffs asserted that the ordinances were unconstitutional on their face and were being enforced in an unconstitutional manner. Five members of the Court agreed that the actions of the officials were an unconstitutional infringement of some protected right, warranting injunctive relief. The vexed question, raised in the context of an inquiry into subject matter jurisdiction, was the source of the protected right. Justice Roberts, joined by Justice Black, asserted that free discussion and dissemination of information concerning a matter of national interest—in this case, the National Labor Relations Act—was a privilege and immunity guaranteed against state infringement by § 1 of the fourteenth amendment. Justice Stone, with Chief Justice Hughes concurring, argued that Gitlow v. New York, 268 U.S. 652 (1925), and similar cases had assured that the fourteenth amendment due process clause encompassed this claim, bringing it within the jurisdictional statute.

Less concerned by the first amendment rights of organized laborers than he had been by the property rights of parochial schools in *Pierce*, Justice McReynolds dissented in the language of an earlier era:

> [T]he District Court should have refused to interfere by injunction with the essential rights of the municipality to control its own parks and streets. Wise management of such intimate local affairs, generally at least, is beyond the competence of federal courts, and essays in that direction should be avoided. There was ample opportunity for respondents to assert their claims through an orderly proceeding in courts of the state empowered authoritatively to interpret her laws with final review here in respect of federal questions.

Id. at 532-33. *Compare* Juidice v. Vail, 430 U.S. 327, 337 (1977) (Rehnquist, J.): "Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceeding. No more is required to invoke *Younger* abstention." (emphasis in original) (footnote omitted).

Douglas v. City of Jeannette[102] illustrates the complexity and delicacy of the adjustments this new challenge obliged the Court to make. The Court in *Douglas* held it improper for a district court to have enjoined the threatened enforcement of a municipal ordinance. Justice Black used the decision to encourage the inference that federal courts lacked the power to grant equitable relief against state officers in state proceedings, rather than to illustrate the circumstances in which it may be appropriate for federal courts to withhold relief as a matter of discretion. The simplest basis for limiting the value of *Douglas* is furnished by its companion case, *Murdock v. Pennsylvania*,[103] in which the Court declared unconstitutional the ordinance under attack in *Douglas*. There was no reason to issue the injunction requested in *Douglas* absent a showing that local officials were likely to continue to prosecute under the invalid ordinance, and every reason of comity for the Court to use avoidance techniques. The petitioners complained only of threatened prosecutions,[104] not pending ones, and the Court concluded that, although the district court undoubtedly had the power to decide the case, the appropriate discharge of equitable discretion lay in declining the exercise of that power.[105]

The picture of federal equity power that emerges from *Matthews*, *Douglas*, and *Great Lakes* is entirely different from the impression created by Justice Black's citations to those cases.[106] Leaving to one side the

102. 319 U.S. 157 (1943). *Douglas* was a suit for an injunction against threatened enforcement of a municipal licensing ordinance against Jehovah's Witnesses. The 1942 Term found Jehovah's Witnesses gathered regularly at the intersection of equity, federalism, and the first amendment. Besides *Douglas*, the Witnesses figured in Jones v. Opelika, 319 U.S. 103 (1943) (vacating 316 U.S. 584); Murdock v. Pennsylvania, 319 U.S. 105 (1943); and Martin v. Struthers, 319 U.S. 141 (1943). Within a month-and-a-half of those proselytizing cases the Court handed down West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), *rev'g* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940)(flag salute case). For interesting discussion of the impact of the Witnesses upon the Justices, and vice-versa, see R. Danzig, Justices Frankfurter and Black, the Flag Salute Cases and Martin v. Struthers (1976) (unpublished manuscript on file in the offices of the *Texas Law Review*).

103. 319 U.S. 105 (1943).

104. 319 U.S. at 159.

105. *Id.* at 162-64. There were several additional reasons why the Court might have wished to avoid deciding *Douglas*. As Justice Jackson pointed out in his vitriolic opinion filed as a concurrence in *Douglas* and as a dissent in *Murdock* and *Martin*, the majority's approach in the latter two cases seemed to decide difficult constitutional problems "by a vague but fervent transcendentalism." *Id.* at 179. The Court was severely divided in matters concerning the aggressive Jehovah's Witnesses, the nascent privacy rights of some of their victims, appeals to unity and patriotism during wartime, and the need to avoid the kind of vigilante justice against the Witnesses that had followed *Gobitis* in the summer of 1940. *See* Danzig, *supra* note 102, at 76-79. Justice Jackson's apparent inconsistency in writing the brilliant civil liberties tract of *Barnette*, just weeks after he suggested that the Witnesses were merely a money-making scheme in his *Douglas* concurrence, may be explained by his role in responding to the anti-Witnesses hysteria as Attorney General in 1940. R. Danzig, *supra* note 102, at 78.

106. Justice Black joined the opinion in *Douglas*, but he turned it on its head when he used it as a building block for Our Federalism in *Younger*. The particular ground for restraint urged in

problem of whether the Court would have decided *Douglas* or *Great Lakes* in the same fashion had not the merits been decided in contemporaneous cases,[107] clearly the decline of jurisdiction in each case was discretionary. The Court exercised this discretion in light of the balance struck between the competing public interests and private rights presented in the facts of each case, not by adherence to a formal rule of nonintervention. Just as the issuance of injunctive relief was a delicate matter in light of the sensitivity of the balance between state and federal power, so too the refusal of jurisdiction required some delicate adjustments in order to retain the appearance of compliance with the command of the jurisdictional statutes.[108]

Douglas—the mere threat of state prosecution—was reversed in *Younger*, where injunction of pending cases was the chief concern. *Douglas* was evidently cited to support the inference that, since an injunction was not entered against threatened prosecutions, pending prosecutions are clearly sacrosanct.

The first hint of a split concerning federal equity between Justice Black and Chief Justice Stone appears in Black's majority opinion in Burford v. Sun Oil Co., 319 U.S. 315 (1943). Much of the opinion deals with the then-traditional acknowledgements of the Court's policy to leave problems of state law to state courts as a matter of "equitable discretion." Black even remarked that such restraint could be exercised "only insofar as we have discretion to do so." *Id.* at 318. The heart of his holding focused on the then-novel doctrine of *Pullman* abstention, but his opinion contained one footnote cataloguing the precedents supporting federal equitable restraint. *Id.* at 333 n. 2. In that footnote he referred to limitations on "equity *jurisdiction*" (emphasis added) as grounds for restraining federal courts. Thus, in an opinion rich with language about discretionary limitations on the exercise of power, Justice Black used a footnote to conflate jurisdiction with equitable discretion. Perhaps it was a slip of the judicial pen, but that passing reference to equitable jurisdiction as an apparent metaphor for lack of federal judicial power contains the seeds of the *Younger* doctrine.

107. *Cf.* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (equitable relief granted with no mention of the problems of federalism). Since the *Barnette* decision was handed down five weeks after *Douglas* and *Murdock*, the considerations of equitable discretion could hardly have slipped the Court's mind in the interim.

For a later pair of cases, related to each other as *Douglas* was to *Murdock* and *Great Lakes* to *Standard Dredging*, see St. John v. Wisconsin Employment Relations Bd., 340 U.S. 411 (1951), and Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951).

108. The propriety of the Court's decline of jurisdiction in equity, with statutory jurisdiction being present and in the absence of an adequate federal remedy at law, remained an issue capable of generating heated language in the opinions as late as 1951 when in Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951), the Court adopted the availability of the state remedy as the standard in a matter of inherently local concern. His concurring opinion bristling with outrage, Justice Frankfurter would have affirmed the district court's dismissal of the railroad's attempt to restrain state officials from forcing the railroad to maintain an allegedly unprofitable line for failure to make out a claim within the equity power of the federal courts. *Id.* at 352-53. He went on, however, to excoriate the majority's holding on principles analogous to those developed a decade earlier by Chief Justice Stone that equitable discretion required dismissal. *See* text accompanying notes 81-97 *supra*. Justice Frankfurter declared that

> [D]iscretion based solely on the availability of a remedy in the State courts would for all practical purposes repeal the [Judiciary] Act of 1875. This Act gave to the federal courts a jurisdiction not theretofore possessed so that a State could not tie up a litigant making such a claim by requiring that he bring suit for redress in its own courts. That jurisdiction was precisely the jurisdiction to hear constitutional challenge to local action on the basis of the vast limitations placed upon State action by the Civil War amendments.

Id. at 361.

The analytic framework of Chief Justice Stone provided flexibility sufficient to support both the denial of equitable relief from state economic regulations and the grant of relief from state infringement of federal civil liberties. While he built appropriate concern for state interests into the framework, he did not eliminate consideration of the claims of private right in either liberty or property.[109] Justice Black's restatement of federal equity, however, deleted the legitimate consideration of claims of private right, leaving nothing to be genuinely balanced against the state's asserted interest in the autonomous pursuit of its own policies. That approach is as skewed toward the state's interest as the Court's earlier approach during the days of substantive due process had been toward claims of private property rights. All elements of discretion, case-by-case consideration, and balancing of identified and articulated competing interests disappeared. Justice Black may have needed to employ absolute terms in *Watson v. Buck*,[110] when the tail of economic substantive due process was still thrashing, but to apply the same reasoning and language in cases concerning civil liberties was entirely inappropriate.[111] Justice Black's intolerance for balancing and his inability to perform it may account in part for the fact that the "rule" of noninterven-

Justice Frankfurter's answer to the dilemma of reconciling federal equity jurisdiction and state autonomy took the form of *Pullman* abstention, in which the federal court retained jurisdiction in conformity with the statutory grant while remitting the case to state courts for resolution of state law questions that might moot the federal questions. *See* Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974), Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977). AFL v. Watson, 327 U.S. 582 (1946), prescnts a paradigmatic collision of views. The majority in *AFL* —a case involving pending quo warranto proceedings and imminent criminal prosecutions—subscribed to the classic doctrine that the federal legal remedy was the standard of measurement, *id.* at 594 n. 9, and, consistent with that view, ordered abstention while emphasizing that the federal court could utilize its equity powers if necessary by retaining jurisdiction and overseeing state proceedings. *Id.* at 599. Chief Justice Stone, in dissent, argued for denial of equitable jurisdiction because of the adequacy of existing state remedies.

In contrast to the Court's present practice of being inaccurate when it is not misleading, and misleading when it is not vague, Chief Justice Stone made an effort, of which the *AFL* dissent is evidence, to perform the role of the judicial statesman in attempting "both to enlist and to satsify public understanding." Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 500 (1928). He seems to have grasped the point that "the basic question [of federalism] is one of public policy, a political question, and not at all a question of law." C. SWISHER, THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES 33 (1946).

109. The contemporaneous development of the abstention doctrines mitigated the impact of Stone's analysis. Abstention permitted the Court to indulge in expansive characterizations of its fidelity to the jurisdictional statutes and of federal equitable powers, while remanding federal claimants to state courts. *See, e.g.*, AFL v. Watson, 327 U.S. 582 (1946).

110. 313 U.S. 387 (1941). *Watson* presented a challenge to Florida statutes regulating copyrights of music.

111. The Court did not consider the greater solicitude normally accorded these fundamental rights. *See* Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965). *Cf.* Shapiro v. Thompson, 394 U.S. 618 (1969) (strict standard of review applied when equal protection challenge concerns fundamental interest).

tion applicable to a claim of first amendment right has taken a form that appears abnormal in the extreme when viewed in light of the precedents.

C. Younger *and "Our Federalism"*

The essential structure of Justice Black's arguments concerning history and policy follow the same model as his substantive arguments based on precedent. He attempted to prove a point that was not needed for his ostensible holding, and what he said for the purpose was not so.

Justice Black first asserted the general proposition that Congress has, from the very first, "manifested a desire to permit state courts to try state cases free from interference by federal courts."[112] That policy, he declared, is embodied in the Anti-Injunction Act, 28 U.S.C. § 2283.[113] Justice Black did acknowledge one exception to the policy of noninterference, adducing *Ex parte Young*[114] as an example. To explain why pending criminal prosecutions could not be enjoined, therefore, Justice Black set up a policy exemplified by a statute that did not distinguish between criminal prosecutions and civil actions, and as an exception to that policy, a decision upholding the injunction of a threatened prosecution. The broad reach of this "longstanding public policy"[115] was matched by the range of sources Justice Black found to support it. Among those sources—Justice Black conceded that *reasons* "have never been specifically identified"[116]—was the doctrine that courts of equity should not act, particularly to restrain

112. 401 U.S. at 43.

113. 28 U.S.C. § 2283 (1970). Justice Black referred the reader to Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941), for an "interesting discussion of the history of this congressional policy up to 1941." 401 U.S. at 43 n.3. *Toucey* was doubtful precedent in 1971, as the Court knew, and as Justice Douglas pointed out in dissent. 401 U.S. at 62. Forty years before *Younger* was decided, two commentators argued that the Anti-Injunction Act was riddled with so many statutory and judicial exceptions that it was a practical nullity. Durfee & Sloss, *Federal Injunctions Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1932). Durfee and Sloss suggested that the only way to determine whether there was any life in the Act would be to repeal it and then see if grants of injunctive relief were affected by the repeal. *Id.* at 1169. Two contemporaneous commentators lamented that the act had been reduced to shreds and tatters. Taylor & Willis, *supra* note 49, at 1194.

The congressional response to the Court's effort in *Toucey* to revive the Act was described in Mitchum v. Foster, 407 U.S. 225 (1972), as follows:

> The congressional response to *Toucey* was the enactment in 1948 of the anti-injunction statute in its present form in 28 U.S.C. § 2283, which, as the Reviser's Notes makes evident, served not only to overrule the specific holding of *Toucey*, but to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision."

407 U.S. at 236.

114. 209 U.S. 123 (1908). While Justice Black saw *Young* as an exception to an established policy, Justice Brennan, concurring separately in Perez v. Ledesma, 401 U.S. 82 (1971), declared that "*Young* seems indispensable to the establishment of constitutional government and the rule of law," *Id.* at 110 (quoting C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 186 (2d ed. 1970)).

115. 401 U.S. at 43.

116. *Id.*

criminal prosecutions,[117] when the plaintiff has an adequate remedy at law. He admitted that "[t]he doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country,"[118] but he found a "fundamental purpose" underlying it, "equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions . . . ."[119]

Neither of those considerations, taken at face value, is confined to criminal proceedings. For example, the role of the civil jury as finder of fact, particularly in jurisdictions using special verdicts, may be quite as important as that of the criminal jury as declarer of guilt or innocence. The chancellor, even a federal one, is no substitute for the jury in either class of case.[120] Since the criminal jury is historically a safeguard for defendants, it would be odd to suggest that a defendant in state criminal proceedings should be denied equitable relief from a federal court with statutory jurisdiction to hear his claim out of concern for the role of the jury, a concern that the defendant evidently does not share.[121]

The first two legs of Justice Black's argument, the Anti-Injunction Act and classical equitable doctrine, are not confined to criminal prosecutions or to pending cases. Of course, he did not rely on either the Act or the doctrine specifically. To have found section 2283 directly applicable would have required a holding that the Civil Rights Act of 1871[122] was not an express exception to it, a proposition the Court was not then ready to address.[123] Instead, he looked both to the policy behind section 2283, employing it as a metaphor rather than as a statute, and to the "fundamental purpose" of the equity doctrine as an analogue to federalism.

Justice Black then merged both his earlier metaphor and the analogy from equity into the notion of comity within the federal system:

117. Justice Black did not specify whether he meant pending prosecutions only.

118. 401 U.S. at 44. A doctrine developed as a rough boundary marker between the judges and chancellors of a single sovereign seems inapplicable to problems of federalism, involving the legal systems of dual sovereigns.

119. 401 U.S. at 44.

120. So far as duplication of proceedings and sanctions are concerned, equitable restraint may be more easily justified in civil cases, in which Justice Black disclaimed any interest, than in criminal prosecutions. In criminal prosecutions the jury may acquit or convict under the state statute. The chancellor's only sanction, however, is dismissal of the charges if he finds that the statute itself is invalid, a consideration beyond the jury's province. In civil cases, moreover, one party wishing a jury trial might be denied it by an opponent's successful invocation of federal equity jurisdiction. *Cf.* DiGiovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 72 (1935) (grounds for equitable relief must be real and substantial, and the necessity must affirmatively appear in order to deprive defendant of the right to a jury trial).

121. *See* O. FISS, INJUNCTIONS 13 (2d ed. 1975).

122. 42 U.S.C. § 1983 (1970).

123. *See* text accompanying notes 134-39 *infra*.

> [A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism" . . . .[124]

124. 401 U.S. at 44. Justice Black did not cite any precedent for his use of "Our Federalism." The fact that he placed it in quotation marks does not, of course, establish it as ancient in usage or specific in content. The phrase occurs in three classes of cases. One is the line of decisions implementing the Erie Doctrine. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring); Guaranty Trust Co. v. York, 326 U.S. 99, 101-02 (1945) (Frankfurter, J.). The second is the opinions of Justice Frankfurter interpreting the Anti-Injunction Act. Toucey v. New York Life Ins. Co., 314 U.S. 118, 141 (1941); Hale v. Bimco Trading Co., 306 U.S. 375, 378 (1939). The third, which Justice Black might not have cared to remember, was the debate over incorporation. In Knapp v. Schweitzer, 357 U.S. 371 (1958), for example, raising the question of incorporation into the fourteenth amendment of the privilege against self-incrimination, Justice Frankfurter wrote that "This Court with all its shifting membership has repeatedly found occasion to say that whatever inconveniences and embarassments may be involved, they are the price we pay for our federalism, for having our people amenable to—as well as served and protected by—two governments." *Id.* at 380. Justice Black dissented vigorously, objecting to a decision by which "a person can be whipsawed into incriminating himself under both state and federal law," adding, "I cannot agree that we must accept this intolerable state of affairs as a necessary part of our federal system of government." *Id.* at 385. For other, sporadic uses of the term our federalism, see Louisiana Power&Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959) (Frankfurter, J.); FELIX FRANKFURTER ON THE SUPREME COURT 262, 336 (P. Kurland ed. 1970); PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT OF THE UNITED STATES, IN MEMORY OF HARLAN FISKE STONE 45 (1948) (remarks of Herbert Wechsler).

As there are distinct lines of cases prior to *Younger* in which "our federalism" appears, so there also seems to have been two Justices Black writing on questions of federalism. In *Younger* he insisted upon foisting "Our Federalism" on the Founders. 401 U.S. at 44-45. He did not mention the fourteenth amendment nor the impact it might have, especially by Black's own incorporationist views, on the federalism of the Founders. That impact was the core of Justice Douglas's dissent in *Younger*. *Id.* at 61-63. Yet Black's opinion in *Younger* followed by only a few years his closing salvo in the incorporation debate: "I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights." Duncan v. Louisiana, 391 U.S. 145, 170 (1968) (Black, J., concurring). The discrepancy could be explained, perhaps, on the basis that in the incorporation debate Black was determined that the same constitutional constraints should apply to state and federal governments. If the substantive standards were identical, Justice Black may not have cared who applied them. Even so, the difference in emphasis remains striking. Professor Burton Wechsler has suggested that Black's early experiences combatting substantive due process rebounded on him in *Younger*, even though the latter case presented a first amendment claim. Wechsler, *supra* note 2, 881-82 n. 631. That may be the only way to explain Black's quotation in *Younger* of language from his own earlier opinion in Watson v. Buck, 313 U.S. 387 (1941), that is particularly hostile to federal equitable relief, *see* 401 U.S. at 46, 43-54, despite the wholly different character of the claims of substantive right presented in *Younger*. It was the Black of *Watson v. Buck*, not the Black of *Duncan v. Louisiana*, who wrote *Younger v. Harris*. What mere federalism did not permit in *Duncan*, "Our Federalism" compelled in *Younger*.

His substitution of a slogan for history has dominated the Court's perception of the development of federalism ever since, despite the occasional appearance of more scrupulous historical analyses. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225 (1972) (Stewart, J.). *See* text accompanying notes 134-39 *infra*.

That "slogan," as Justice Black himself called Our Federalism,[125] was said to embody the "ideals and dreams" of the Framers, and counseled the federal government not to "unduly interfere with the legitimate activities of the States."[126] Whatever the Framers' dreams may have been[127] and whatever the measure of "undue" interference may be—Justice Black was not specific on either point—no obvious reason appears why they should be limited to injunctions against pending criminal proceedings. Our Federalism was a term of such general, evocative import as potentially to embrace noncriminal proceedings, regardless of pendency in state court, as easily as it covered the case of Harris.

The actual holding of *Younger* and its companion cases, that absent bad faith or harassment, federal equitable relief is barred once criminal proceedings have commenced in state court, was supportable by a relatively unbroken line of precedent of respectably ancient vintage. In all but pending criminal cases, however, federal courts granted or denied equitable relief on a balancing of interests that Justice Black ignored.[128] As a brief, his history could be acceptable; as a statement of "settled law," it is not.

125. 401 U.S. at 44.

126. *Id.*

127. One Framer, at least, dreamed dreams of a character quite different from that suggested by Justice Black. When John Rutledge spoke in the Constitutional Convention against constitutional establishment of inferior federal courts because they would encroach on the states,

> Mr. Madison observed that unless inferior federal tribunals were dispersed throughout the Republic with *final* juridsiction [*sic*] in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper verdict in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury?

1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (rev. ed. 1966). The question was so closely debated that the language of article III placing creation of such courts within congressional discretion was offered and accepted as a compromise.

As for the lofty considerations of comity allegedly behind the enactment in 1793 of the Anti-Injunction Act, Taylor and Willis dispute Warren's argument that it was offered as a statutory adjunct to the eleventh amendment, on the grounds that Edmund Randolph had proposed a similar bill in 1790. *See* Warren, *supra* note 48, at 348 n.14; Taylor & Willis, *supra* note 49, at 1171. *See also* Tennessee v. Davis, 100 U.S. 257, 266 (1879); Comment, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent*, 38 U. CHI. L. REV. 612 (1971).

128. For a collection of the early cases, see Wechsler, *supra* note 2 at 779 n.154 & 784 n.169. Even outside the preferred circle of fundamental liberties, the Court has been willing to uphold jurisdiction in suits seeking federal court injunctions of state criminal statutes. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963). The lower federal courts, while mindful of the "rule," have been mindful also of the exceptions. In Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956), for example, the three-judge district court considering a suit to enjoin enforcement of an ordinance requiring segregated seating in buses, stated in response to the argument that equity and comity defeated jurisdiction that "The short answer is that doctrine has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal courts have a responsibility as heavy as that which rests on the State courts." *Id.* at 713.

D. Summary

The theoretical underpinnings of Justice Black's position are as thin as his exposition of its basis in case law. In fact, there is so much less to Our Federalism than meets the eye that the discrepancy appears conscious and deliberate. It was not that Justice Black used his materials sloppily so much as that he had very little material with which to work. Had he been able to support *Younger* as a policy decision,[129] he would not have had to present Our Federalism as the imperative of history and stare decisis.

In Justice Black's jurisprudence, however, so extensive a departure from prior standards and decisions could not be admitted as judge-made. He had to find it in history; not history in the sense of processes of growth, change, and adjustment, but history in the sense of given absolutes—Original Understanding, Plan of the Union, usage so ancient that "the memory of man runneth not to the contrary." Our Federalism had to be placed beyond the reach of other judges to examine and to change.

Announcement of *Younger* as policy, as the solution to a problem, would have placed the Court under an inescapable obligation to identify each of the interests affected by Our Federalism, including those of individuals claiming state abridgement of their federal civil liberties. Identification of that interest would have required it to be weighed explicitly and a balance to be struck among all of the affected interests. The great guardian of constitutional absolutes was no friend of balancing elsewhere, and it would have been intolerable here. Balancing—the very essence of equitable discretion as exercised historically—had no place in Our Federalism.

The over-reaching determination to settle federalism irrevocably is the great and pervasive flaw in Black's approach. *Osborn v. Bank of the United States*[130] settled that federalism cannot be perceived as a zero-sum game and still make any practicable sense. Federalism cannot permit simple declarations that a case is properly either in a state court or in a federal court; such a

Faced with the same issue in a later case, the Fifth Circuit followed *Browder v. Gayle*. "That case disposes of the contention that the federal court should not grant an injunction against the application or enforcement of a state statute, the violation of which carries criminal sanctions." Morrison v. Davis, 252 F.2d 102, 103 (5th Cir.), *cert. denied*, 356 U.S. 968 (1958). The court of appeals also rejected comity as a bar to issuance of equitable relief "since for the protection of civil rights of the kind asserted Congress has created a separate and distinct federal cause of action. 42 U.S.C.A. § 1983." *Id.* So far as that result was inconsistent with *Douglas v. City of Jeannette*, the court regarded *Douglas* as modified by *Browder*. *Id.*

129. Consider the concurring opinion of Justice Stewart in *Younger*, in which he refers to the case as a policy decision. 401 U.S. at 55. *See also* Mitchum v. Foster, 407 U.S. 225, 230, 231 (1974); United States v. Bass, 404 U.S. 336, 349 (1971) (*Younger* as judge-made doctrine, per Marshall, J.).

130. 22 U.S. (9 Wheat.) 738 (1824).

declaration can be made only after oversimplifying the problem. Our Federalism operates on the premise that federal civil liberties are a constant, with no alteration of the scope of the rights or of the authority of the federal government to secure them from state interference. The only question is how state and federal governments construct their spheres of protection. The individual petitioner is no more than a token in the struggle between sovereigns, and Our Federalism operates as a hieratic metaphor against which the federal sovereign has little strength in the struggle.

Our Federalism basically misconceives the federal system. Federal and state powers ebb and flow relative to one another in response to messy and mutable social, political, and economic conditions. They cannot be contained by a formula, least of all a rigid one. As Woodrow Wilson wrote, "[Federalism] cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."[131] Wilson certainly would have considered the application of the Bill of Rights to the states a significant stage of political development. Had Black conceded that dynamic character of federalism, he might have been satisfied by offering his own contribution to the debate. Our Federalism, however, was calculated to end debate altogether.[132]

131. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173 (1908), *quoted in* C. SWISHER, *supra* note 108, at 26.

Professor Frankfurter described the federal-state court dialectic as "the very stuff of American politics, to be settled or evaded by the compromises of one generation, only to reappear in the next." Frankfurter, *supra* note 108, at 500. He regarded the changing balance as concerning "matters not of principle but of wise expediency." *Id.* at 506.

132. Statutory authority, weight of precedent, equity, and comity, taken singly or in bulk, do not explain or justify the *Younger* doctrine. In light of its commitment to the doctrine, however, the Court may attempt to put the matter beyond the reach of congressional modification. The eleventh amendment appears to offer a hospitable text for Our Federalism. Only by overruling *Ex parte Young*, however, could the peculiar language of that amendment be made to serve. Hints have arisen in recent decisions that the Court is considerably more interested in advancing the new doctrine than in maintaining the rule of *Young*, at least where civil liberties are affected. *Compare* Gibson v. Berryhill, 411 U.S. 564 (1973), and Fuentes v. Shevin, 407 U.S. 67 (1972), *with* Hicks v. Miranda, 422 U.S. 332 (1975), and Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). *But see* Trainor v. Hernandez, 97 S.Ct. 1911 (1977). In Rizzo v. Goode, 423 U.S. 362 (1976), for example, the Court found the *Younger* doctrine (without invoking it by name) applicable to suits against municipal officers, when no state proceeding was pending or threatened. The Court was replying to a claim that § 1983 plaintiffs have a right to federal injunctive relief against supervisory personnel who failed to correct the unconstitutional depredations of their subordinates. Justice Rehnquist, however, employed language so broad that it might also apply to a situation in which defendants were direct civil rights violators. If the *Rizzo* analysis is applied in such a situation, *Young* would be eviscerated. The way would then be open to locate Our Federalism in the eleventh amendment.

If the Court rejects *Young*, and interprets the eleventh amendment as a basis for Our Federalism, Congress may still be able to act. For arguments that the eleventh amendment was not intended to bar congressional action, see Nowak, *The Scope of Congressional Power to*

III. The Death of Equity: *Huffman v. Pursue, Ltd.*

The narrowness of the holding in *Younger* left many questions unresolved. The prospect of future opportunities to limit the new doctrine of federalism to the facts of *Younger* and its companion cases may have led some members of the Court to concur in the results, confining themselves to temperate statements in mitigation of Black's language and, in part, his reasoning.[133]

Until the 1974 term it appeared that the holding of *Younger*, rather than the rhetoric of Our Federalism, might remain the rule. Although equitable interference with pending state criminal prosecutions might be possible only on a showing of prosecutorial bad faith or harassment, traditional equitable notions of irreparable harm might still support intervention

Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 COLUM. L. REV. 1413, 1441-45 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976); Employees v. Missouri Pub. Health Dept., 411 U.S. 279, 298 (1973) (Brennan, J., dissenting). The Court has stated recently that the power of Congress as against the states is greater under the enforcement clause of the fourteenth amendment than under article 1, so that federal suits against the states by private persons pursuant to § 5 are maintainable. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). If Congress is indeed authorized to establish causes of action under the fourteenth amendment not proper under article 1 or, alternatively, is not bound by the eleventh amendment, the eleventh amendment would not insulate Our Federalism from congressional modification.

The tenth amendment is applicable, however, to federal power generally. The Court has revived the amendment, if only as a metaphor, holding in National League of Cities v. Usery, 426 U.S. 833 (1976), that the constitutional policy expressed in the tenth amendment restrains Congress from impairing "the States' integrity or their ability to function effectively in a federal system." *Id.* at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)). A challenge to congressional action under *National League* requires inquiry into whether the state functions that are impaired are essential to the state's separate and independent existence. 426 U.S. at 845. Undoubtedly, any attempt by Congress to vitiate the functioning of state courts would fall before the test, but provision of a federal forum for expeditious treatment of federal rights hardly seems to abrogate any essential function of state government. And although the Court's latest expedition into *Younger* radiates an almost cloying solicitude for state interests, *see* Trainor v. Hernandez, 97 S. Ct. 1911 (1977), an attempt to constitutionalize *Younger* through the tenth amendment would fall before the recognition of the impact of the fourteenth amendment on federalism, an impact even Justice Rehnquist acknowledges. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). *Cf.* National League of Cities v. Usery, 426 U.S. 833, 852 n.17 (1976) (express reservation of consideration of Congress's power under § 5 of the fourteenth amendment). *See generally* Civil Rights Improvements Act of 1977, S. 35, 95th Cong., 1st Sess., 123 CONG. REC. S201 (daily ed. Jan. 10, 1977) (proposed restrictions on the *Younger* doctrine).

As Professor Shapiro has pointed out, the tenth amendment is hard to take seriously as a metaphor for states' rights. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 302, 306-07 (1976). The amendment merely articulates inchoate notions of federalism, and although that may be in keeping with Justice Rehnquist's own views and with the *Younger* doctrine, it falls well short of tying *Younger* into the tenth amendment in any textually, or even conceptually, supportable fashion. Indeed, it is hard to see how the *Younger* doctrine could be supported in either the tenth or eleventh amendment without appearing as a natural law "excrescence" on the text of the Constitution as incongruous as any excoriated by Justice Black. *See* Adamson v. California, 332 U.S. 46, 75 (1947) (Black, J., dissenting).

133. *See* notes 39 & 40 *supra*.

in other contexts. During the four years following *Younger*, the Court had several opportunities to expand Our Federalism beyond the facts of *Younger*, but declined to take them.

The most important of the cases was *Mitchum v. Foster*,[134] in which the Court considered a question explicitly reserved in *Younger*[135]—whether relief sought under section 1983 was barred by the Anti-Injunction Act. In *Mitchum* a Florida bookseller, charged under a public nuisance statute for selling allegedly obscene books, brought a civil rights action under section 1983 for federal declaratory and injunctive relief. He claimed that the state statute was unconstitutional as applied to him and that its continued enforcement would subject him to irreparable harm. State proceedings were pending at the time the federal suit was filed, but they were not criminal in nature. The district court held the action barred by the Anti-Injunction Act, and the Supreme Court reversed.

Justice Stewart, writing for the Court, looked to history for assistance in resolving the tension between section 2283 and section 1983. Justice Black's historical essay in *Younger* had been both *antebellum* and anti-Reconstruction, effectively deleting the nineteenth century and the Civil War from "history" altogether. Even the existence of the Civil Rights Act would seem anomalous from this perspective. Justice Stewart dwelt at length upon the statute and the historical circumstances of its enactment, to determine whether it was intended to be an express exception to section 2283. He concluded that "the very purpose of section 1983 was to interpose the Federal courts between the States and the people, as the guardians of the people's federal rights."[136] The Court declared that Congress deliberately

134. 407 U.S. 225 (1972).

135. 401 U.S. at 54. The problem of the relation between the Anti-Injunction Act, 28 U.S.C. § 2283, and the Civil Rights Act of 1871, 42 U.S.C. § 1983, had divided the Courts of Appeal for two decades. *Compare* Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964) (§ 1983 is not an express exception to § 2283), *cert. denied*, 381 U.S. 939 (1965) *with* Cooper v. Hutchinson, 184 F.2d 579 (3d Cir. 1950). *See also* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970), in which Justice Black insisted upon the integrity of § 2283. As Justice Stewart noted in *Mitchum*, however, Justice Black's language was not addressed to "expressly authorized" exceptions. Thus the *Mitchum* Court was able to escape the strictures of *Atlantic Coast Line* with respect to § 2283, just as the facts of *Mitchum* preserved it from the *Younger* doctrine.

136. 407 U.S. 225, 242 (1972). Traditionally, the Court looked upon the Civil Rights Acts and the Reconstruction amendments as the legal detritus of an aberrational period—an attempted coup by Radical Republicans of "vengeful spirit." Those enactments were narrowly construed, with a view to restoring the *status quo ante bellum* of federalism. In the Civil Rights Cases, 109 U.S. 3 (1883), for instance—virtually the fountainhead of this tradition—the Court declared that the time had come when the black man "ceases to be the special favorite of the laws." *Id.* at 25. This hostility to federal protection of federal claimants jeopardized by actions of state and local government appears throughout the Court's opinions well into this century. *See, e.g.*, Collins v. Hardyman, 341 U.S. 651, 657 (1951) (Jackson, J., dissenting); Screws v. United States, 325 U.S. 91, 140, 144 (1945) (Roberts, J., dissenting, joined by Frankfurter and Jackson, J.J.). The

conceived the Reconstruction legislation, of which the Civil Rights Act was a part, as

> altering the relationship between the States and the Nation with respect to the protection of federally created rights; [Congress] was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic

Court's dismissive attitude toward Reconstruction as it affected federalism was supported by the work of professional historians, most notably W. A. Dunning, whose *Reconstruction: Political and Economic, 1865-1877*, published in 1907, shaped and dominated the field for four decades. The exigencies of the civil rights struggles of the 1960's drove the Court to modify explicitly the narrow view of federal power implicitly required by its earlier interpretation of Reconstruction. *See, e.g.*, Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); United States v. Price, 383 U.S. 787, 806-07 (1966). In the same period a new generation of historians loosed a veritable flood of new studies of the Civil War and Reconstruction. Applying new analytical techniques to old material, as well as to freshly mined data such as voting patterns, they developed a sharply altered picture of Reconstruction. According to the revisionist position, most members of Congress, and the nation as a whole, were aware after the war that the balance of federalism was altered fundamentally. There existed a conscious intent, enjoying substantial public support, for more drastic change than the Supreme Court had supposed or permitted. *See generally* M. BENEDICT, A COMPROMISE OF PRINCIPLE (1974); W. BROCK, AN AMERICAN CRISIS (1963); L. & J. COX, POLITICS, PRINCIPLES AND PREJUDICE: 1865-1966 (1963); D. DONALD, THE POLITICS OF RECONSTRUCTION (1965); H. TREFOUSSE, THE RADICAL REPUBLICANS (1969). Some of the best of a spate of essays, more specific in focus but also developing the revisionists' view, may be found in RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS (K. Stampp & L. Litwack eds. 1969); THE RADICAL REPUBLICANS AND RECONSTRUCTION 1861-1870 (H. Hyman ed. 1967); THE ANTI-SLAVERY VANGUARD: NEW ESSAYS ON THE ABOLITIONISTS (M. Duberman ed. 1965). Justice Stewart's opinion in *Mitchum* reflected the same revisionism in its interpretation of the intent of the legislative aftermath of the Civil War. Not surprisingly, Justice Stewart relied upon a decision antedating the *Civil Rights Cases* to find recognition of "a vast transformation" in federalism, warranting intervention by federal courts to protect citizens from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." 407 U.S. 225, 240 (quoting *Ex parte* Virginia, 100 U.S. 339 (1880)).

Our Federalism clearly springs from the older approach. In fact, Justice Black did not even refer to the fourteenth amendment in *Younger* itself. Subsequent opinions by the most energetic proponents of Our Federalism support the hypothesis advanced by Professor Sedler shortly after *Younger*, that the Burger Court might be determined to prevent "civil rights law" of the 1960's from becoming civil liberties law for the future. Sedler, *supra* note 2, at 9-11, 58. The present Court's tendency may be surmised from Paul v. Davis, 424 U.S. 693 (1975). In rejecting a claim that freedom from injury to one's reputation is within the due process protections of "liberty" or "property," Justice Rehnquist argued *in terrorem* against a broad interpretation of § 1983. His opinion for the five-man majority stated that § 1983 ought not be interpreted to permit actions against state officials for each and every abuse of individual rights under color of state law, lest the fourteenth amendment become "a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 701. Justice Rehnquist declared, quoting out of context Justice Douglas's language in Screws v. United States, 325 U.S. 91, 109 (1945), that the fourteenth amendment "did not alter the basic relation between the States and the national government." *Id.* It is even harder to reconcile this historical perspective with *Mitchum* than it is to reconcile the holding in *Paul v. Davis* with Wisconsin v. Constantineau, 400 U.S. 433 (1971).

Still, even in the full tide of the *Younger* doctrine, the Court has not entirely forgotten *Ex parte Virginia*. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). For a complete analysis of the rich tradition of legal misunderstanding of the historical setting of the Civil Rights Acts, see Soifer, On Pouring Old Lines into New Battles: The Civil Rights Act of 1866 and All That (manuscript on file in the offices of the *Texas Law Review*).

> to the vindication of those rights; and it believed that these failings extended to state courts.[137]

With an approving reference to Our Federalism, so far as it remained tied to pending criminal prosecutions,[138] the Court held that the Anti-Injunction Act alone was no bar to a section 1983 action for relief from pending

137. 407 U.S. 225, 242 (1972).

138. Two other decisions soon after *Younger* also suggested that the doctrine might be largely restricted to its narrow origin. In Gibson v. Berryhill, 411 U.S. 564 (1973), the Court appeared both to narrow *Younger* and to give life to its exceptions. Justice White, writing for the Court, stated that the restraints of *Younger* were predicated upon "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Id.* at 577. He accepted the district court's finding that the Alabama Board of Optometry was biased against optometrists employed by corporations. The Court did not require the federal plaintiffs, whose case was then pending before the Board, to resort to the state judicial remedies available to them under state law for review of the Board's decision. Even the fact that plaintiffs were involved in a parallel suit in state court, where rejection of their claim by a lower court was on appeal, did not preclude federal intervention. The irreparable harm alleged in *Gibson* and accepted by the Court was deprivation of property, defined as "the right to practice their professions." *Id.* at 571. That concern for irreparable injury, with its nostalgic echo of equity, may explain the decision in *Gibson* and, from the perspective of later Terms, explain it away. For a fleeting moment, however, *Gibson* made it appear that *Younger* might be limited to its holding, which the *Gibson* Court restated in narrow, disjunctive terms: "[A] federal court may not enjoin a pending state criminal proceeding in the absence of special circumstances suggesting bad faith, harassment *or* irreparable injury that is both serious and immediate." *Id.* at 573-74 (emphasis added).

The third apparent limitation of the *Younger* doctrine came in March, 1974, in Steffel v. Thompson, 415 U.S. 452 (1974). The facts of that case permitted Justice Brennan, writing for the Court, to establish what he had previously been able only to urge in his separate opinion in *Perez*. Steffel had been threatened with arrest under Georgia's criminal trespass law for distributing antiwar handbills outside of a shopping center. Moreover, his companion actually had been arrested, so the requirement of actual controversy was clearly met for purposes of considering declaratory relief. Additionally, no proceedings were pending against him, so there could be no direct application to his suit of the principles of *Younger*. Free to retrieve the Declaratory Judgment Act from the shadow of *Samuels*, Justice Brennan did so in a comprehensive opinion declaring that considerations of equity, comity, and federalism "have little vitality" when declaratory relief is prayed for and no state prosecution is pending. 415 U.S. at 462-68. He added that no showing of bad-faith harassment was necessary and, as long as a genuine threat of enforcement of the challenged statutes is made out, the complaint is good whether accompanied by an attack on the statute on its face or as applied.

Justice Brennan reiterated that the Civil Rights Act of 1871 and the Judiciary Act of 1875, coupled with *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference. Justice Stewart concurred, joined by Chief Justice Burger, to stress that circumstances would be "exceedingly rare" in which persons similar to Steffel would have standing. 415 U.S. at 476. Justice White concurred separately to express his "tentative views" in disagreement with Justice Rehnquist and the Chief Justice on the issues of the proper res judicata effect to be accorded a federal declaratory judgment and whether the federal declaratory judgment could properly serve as the basis for a federal injunction of a later state prosecution for similar conduct. Justice White would have given a declaratory judgment res judicata effect, regarding it as "more than a mere precedent"; he also argued that "it would not seem improper to enjoin local prosecutors who refuse to observe adverse federal judgments." *Id.* at 477-78. Justice Rehnquist disagreed on both questions, emphasizing "critical distinctions which make declaratory relief appropriate where injunctive relief would not be." *Id.* at 481. He also asserted that a federal declaratory judgment could be used only "to bolster [a federal plaintiff's] allegation of unconstitutionality in the state trial with a decision of the federal district court in the immediate locality." *Id.* at 484.

noncriminal proceedings in state courts.[139]

In Supreme Court litigation, however, as in the world of William Faulkner, "[t]he battle is never won;"[140] whoever wins, it won't be for good and it won't be for long. *Mitchum*, though not overruled, was demolished in 1975 by *Huffman v. Pursue, Ltd.*[141] *Huffman* was Our Federalism's great leap forward. As in *Younger*, the Court's policy appears as clearly from its methodology as from its holding. *Huffman*, however, bore the distinctive mark of Justice Rehnquist, who emerged as the Court's majority whip in the development of the *Younger* doctrine.[142]

Huffman arose on facts virtually identical to those in *Mitchum v. Foster*. An Ohio county court of common pleas found that a movie theatre had shown obscene films, and ordered it closed for a year, as provided by an Ohio public nuisance statute.[143] Bypassing the state appellate process, the theatre proprietor sought declaratory and injunctive relief from a three-judge federal district court against enforcement of the state court judgment. The district court found that, although the statutory definition of obscenity passed constitutional muster, the order closing the theatre for a year imposed a prior restraint on the showing of films not yet adjudged obscene. The court was not asked to and did not consider the possible application of *Younger*. The prosecutor raised *Younger* considerations on appeal to the Supreme Court, however, and a majority of the justices found them controlling.

The Court held that the logic of the *Younger* doctrine compelled its extension beyond pending prosecutions to include at least civil nuisance proceedings brought by prosecutors under state statutes related to substantive criminal prohibitions of obscenity. Even though the nuisance proceeding against Pursue had concluded and Ohio case law made appeal seem

139. Chief Justice Burger, joined by Justices White and Blackmun, noted in a separate concurrence that *Younger* and *Samuels* had left open the applicability of Our Federalism to state civil proceedings, and they expressed the hope that the district court, upon remand, would first address that problem. 407 U.S. at 244. Just as Stewart had chalked off § 1983 from *Younger* and *Samuels*, the Chief Justice chalked off the civil-criminal distinction, evidently hoping to salvage something for *Younger* from § 1983. *See also* Fuentes v. Shevin, 407 U.S. 67, 97-99 (1972) (White, J., with Burger, C. J. and Blackmun, J., dissenting); Lynch v. Household Fin. Corp., 405 U.S. 538, 560 (1972) (White, J. with Burger, C. J., and Blackmun, J. dissenting). The hope was well founded. *See* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), *discussed in* text accompanying notes 141-204 *infra*.

140. W. FAULKNER, THE SOUND AND THE FURY 95 (Mod. Lib. ed. 1946).

141. 420 U.S. 592 (1975). The Court had avoided the issue of the integration of *Younger* and § 1983 on numerous previous occasions. *See* Sosna v. Iowa, 419 U.S. 393 (1975); Speight v. Slaton, 415 U.S. 333 (1974) (per curiam); Gibson v. Berryhill, 411 U.S. 564 (1973), *discussed in* note 138 *supra*.

142. *See generally* Rydell, *Mr. Justice Rehnquist and Judicial Self-Restraint*, 26 HASTINGS L.J. 875 (1975); Shapiro, *supra* note 132, at 294, 315-22; Note, *Essays in Repression: First Term Opinions of Mr. Justice Rehnquist*, 4 N.C. CENT. L. REV. 53 (1972).

143. OHIO REV. CODE ANN. § 3767.01-.11 (Page 1975).

futile,[144] the Court held that Pursue had foregone its federal constitutional claims by failing to exhaust state appellate remedies. The Court did not extend *Younger* to nonpending proceedings so much as it extended the notion of pendency to include state appellate remedies.

Mitchum, though virtually indistinguishable from *Huffman* in its facts and procedural posture—except that the pendency of proceedings was clearer in *Mitchum*[145]—might never have been written. Justice Rehnquist, writing for the majority, remarked only that the Court in *Younger* had "noted . . . a congressional statute manifest[ing] an interest in permitting state courts to try state cases."[146] A footnote identified that statute as the Anti-Injunction Act, to which section 1983, the basis of the claim in *Huffman*, had been held an expressly authorized exception in *Mitchum*. The Act was quoted in full, and the following was added: "We held in *Mitchum v. Foster* that 42 U.S.C. § 1983 contained an expressly authorized exception. Thus, while the statute does express the general congressional attitude which was recognized in *Younger*, it does not control the case before us today."[147] There is no other reference in the opinion to *Mitchum*, to the historical essay upon which its holding was built, nor to the holding itself.[148] From the appearance of *Mitchum*'s otherwise unmarked grave, it must be understood that the Anti-Injunction Act did not control the *Huffman* case. The Court failed to consider the effect of section 1983 on Our Federalism, asserting instead a speculative "general congressional attitude" superior to the specific terms of the Anti-Injunction Act and proof against any "expressly authorized exception" such as the Civil Rights Act.[149]

144. *See* State *ex rel.* Keating v. "Vixen", 27 Ohio St. 2d 278, 272 N.E.2d 137 (1971); State *ex rel.* Ewing v. "Without A Stitch", 28 Ohio App. 2d 107, 276 N.E.2d 655 (1972), *aff'd as modified*, 37 Ohio St. 2d 65, 307 N.E.2d 911 (1974); State *ex rel.* Dowd v. "Pay the Baby Sitter", 31 Ohio Misc. 208, 287 N.E.2d 650 (C.P. 1972). *But cf.* Huffman v. Pursue. Ltd., 420 U.S. 592, 610 (1975) (the *"Vixen"* decision did not confront principal contention of *Huffman* plaintiffs).

145. In *Mitchum*, plaintiff had appealed state court interlocutory orders and contempt citations under the state general nuisance statute. Review of lower court actions was "presently pending upon plaintiff's appeal before the appropriate Florida appellate court" at the time of the federal three-judge court decision. 315 F. Supp. 1387, 1388 (N.D. Fla. 1970). The court emphasized that the state court had taken jurisdiction and entered its original order before the initiation of the federal suit. The *Huffman* Court would have said those appeals were pending, and that their pendency precluded consideration of the federal suit on its merits. The *Mitchum* Court, however, merely referred to "further inconclusive proceedings in the state courts." 407 U.S. at 227.

146. 420 U.S. 592, 600 (1975).

147. *Id.* at 600 n.15.

148. The Court may have treated *Mitchum* so lightly because, like Fuentes v. Shevin, 407 U.S. 67 (1972), it was decided prior to the installation of Justices Powell and Rehnquist. *Fuentes* was later dismissed as the product of "a bob-tailed Court." North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 614 (1975) (Blackmun, J., dissenting, joined by Rehnquist, J.). The *Mitchum* Court was unanimous, however, on the § 1983 question.

149. That footnote and its accompanying text mark the point where Our Federalism took on

Justice Rehnquist did not attempt to reconcile the *Mitchum* Court's recognition of a "vast transformation" in federalism wrought by the Civil

a life of its own, severed from the holding in *Younger* and from the tradition of equity with which the holding was consistent. Though the Anti-Injunction Act was found not to apply in either *Younger* or *Huffman*, it was nonetheless a crucial element in the development of the *Younger* doctrine in two respects. The Act was not applied in *Younger* because the Court apparently was not ready to offer a definitive statement of the relation between § 2283 and § 1983. The Act could not be applied in *Huffman* because, by the time that case was decided, the Court in *Mitchum* had excepted § 1983 actions from § 2283. The relative rigidity of § 2283 may have made the *Younger* Court reluctant to hold it superior to § 1983, just as the lack of any other method of controlling possible excesses of equitable intervention under § 1983 may have disinclined the *Younger* Court to find § 1983 an exception to § 2283. Our Federalism supplied the restraint upon intervention under § 1983 that the Court was not ready to impose by way of § 2283. So seen, *Younger* may have made the holding in *Mitchum* possible. The rhetoric of Our Federalism, at a level of abstraction well beyond the point of tension between the statutes, provided the Court with the raw material for a flexible restraint upon the grant of equitable relief that it had to possess before it could remove § 2283 as a possible bar to relief. In *Huffman*, with § 2283 unavailable, the Court invoked the *Younger* doctrine and applied it to facts the *Younger* Court would have found inapposite. Justice Black laid the charge with the rhetoric of his *Younger* opinion, and Justice Rehnquist detonated it in *Huffman*.

The Anti-Injunction Act bears on Our Federalism in another and more profound respect. The inference was encouraged in *Younger*, and suggested again in *Huffman*, that § 2283 was evidence of a congressional commitment to a spirit of comity deeper and more pervasive than any encompassed by the language of the statute. Under this view, the Court's development of Our Federalism as a judicial doctrine was neither innovation nor usurpation, but rather a pledge of allegiance to the spirit of our institutions previously articulated in narrower form by Congress. If Congress intended the original version of the Anti-Injunction Act in 1793 as an exercise in comity, then it may be accepted also that the *Younger* doctrine is only the Anti-Injunction Act writ large. If, in addition, it is supposed that the Court consistently construed the Anti-Injunction Act strictly, then Our Federalism is merely a description—as Justice Black claimed—of the intent of the Act and the spirit in which it was always interpreted.

Much has been written and little is known about the legislative intent behind the 1793 Act. It was debated in a spate of law review articles between 1927 and 1932, to an inconclusive result. *See* Durfee & Sloss, note 113 *supra*; Isseks, note 65 *supra*; Lockwood, Maw & Rosenberry, note 65 *supra*; Taylor & Willis, note 49 *supra*; Warren, note 48 *supra*. All of the writers except Durfee and Sloss appear to have been students or colleagues of *Professor* Frankfurter. The tergiversations of *Justice* Frankfurter on the subjects of federalism and § 2283 also illustrate the pointlessness of any argument on behalf of Our Federalism based on legislative intent or consistent judicial practice.

Justice Frankfurter's first opinion for the Court addressed the predecessor of § 2283, finding it "an historical mechanism . . . for achieving harmony in one phase of *our complicated federalism* by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject-matter." Hale v. Bimco Trading Co., 306 U.S. 375, 378 (1939) (emphasis added). He cited Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920), in which the Court had construed the Act most generously in favor of the exercise of federal jurisdiction, as the leading case expounding the Act, ignoring the more recent decision in Hill v. Martin, 296 U.S. 393 (1935), which appeared to limit *Wells Fargo* considerably. *See* note 159 *infra*. In *Hale* the state supreme court had deferred state proceedings pending the outcome of federal litigation. Therefore, taking the Anti-Injunction Act as a rule of comity intended to prevent "unseemly" interference with state courts, Wells Fargo v. Taylor, 254 U.S. 175, 183 (1920), it was not relevant to *Hale*.

In the following year Justice Frankfurter continued to describe the Anti-Injunction Act in terms of comity, but Our Federalism had ceased to be "complicated." *See* Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4 (1940). In 1941, however, in his opinion for the Court in Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941), Justice Frankfurter undertook a complete reappraisal of the origins and purposes of the Act. He rejected the argument of his former colleague, Charles Warren, that the Act was a statutory companion to the eleventh amendment intended to be broad and complete in its insulation of state courts from federal

War with the *Younger* Court's failure even to mention the "Second Con-

interference. *See* Warren, *supra* note 48, at 347-48. Instead he developed the suggestion of two of his former students that the Act was passed out of congressional hostility—more particularly, Oliver Ellsworth's hostility—to equity. 314 U.S. at 130-32. *See* Taylor & Willis, *supra* note 49, at 1170-71. Conceding that the legislative history of the Act was "not fully known," 314 U.S. at 130, Frankfurter found that "the purpose and direction underlying the provision are manifest from its terms: . . . . The provision expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court." *Id.* at 132. Asserting that Congress had made "few withdrawals from this sweeping prohibition," *id.*, he then devoted six-and-one-half pages to a catalogue of the exceptions inferred by the Court, the statutory exceptions, and the meandering lines of the Supreme Court's interpretations of the Act. *Id.* at 132-39. From all of this material he concluded, with more certainty than he had begun, that there was really only one court-made exception, for protection of in rem federal jurisdiction.

He dismissed the exception for state judgments fraudulently or improperly obtained, noting that *Hill v. Martin*, which he ignored in *Hale*, made the foundation of cases such as *Wells Fargo*, upon which he had relied earlier, "very doubtful." 314 U.S. at 139. He was more troubled by the "relitigation" exception, allowing injunction of parties subject to a federal judgment from pursuing the same matter anew in state courts. He observed lamely that support for such an exception could be found only in "[l]oose language and a sporadic, ill-considered decision." *Id.* In light of this restrictive analysis, Justice Frankfurter rejected the exception proposed by the federal plaintiff. "The explicit and comprehensive policy of the Act of 1793 has been left intact," he wrote; just because one exception had "found its way" into the statute, that was "no justification for making another." *Id.* at 139.

The Court, undeterred, continued to discover exceptions to the Act. The Emergency Price Control Act was added to *Toucey*'s list of exceptions by a unanimous Court in Bowles v. Willingham, 321 U.S. 503, 510 (1944), and two years later the *Bowles* rule was extended in Porter v. Dicken, 328 U.S. 252 (1946), in which a unanimous Court, per Justice Black, cited *Hale v. Bimco Trading Co.*, and omitted *Hill v. Martin*.

Congress in 1948 disavowed the intent Justice Frankfurter imputed to it in *Toucey*, by reenacting the statute. The Reviser noted that "the general exception [was] substituted to cover all exceptions," and that the revision was intended to restore "the basic law as generally understood and interpreted prior to the Toucy [*sic*] decision." H.R. Rep. No. 308, 80th Cong., 1st Sess., p. A181, A182. Justice Frankfurter's normally deferential posture toward the legislative branch deserted him in Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955); he suffered instead from cognitive dissonance. Though Congress appeared to have cut the ground out from under *Toucey*, Justice Frankfurter was unabashed and undismayed. He found that the 1948 revision merely confirmed the approach imputed to Congress in *Toucey*. He even quoted so much of the Reviser's Notes as he could use to support his position, stopping one page short of the disapproval of *Toucey*. 348 U.S. at 515. Frankfurter had begun his opinion in *Toucey* somewhat tentatively, owing to the admitted scarcity of authoritative historical materials, but picked up certitude as he went on. In *Amalgamated Clothing Workers* he knew nothing more about the Act than he knew in 1941, except that Congress had rejected the position he staked out for it in the earlier case. Unhestitatingly, however, he declared that the 1948 Act was "a clear-cut prohibition qualified only by specifically defined exceptions," and that prohibition was "not to be whittled away by judicial improvisation." *Id.* at 514, 515-16. The dissenters, including Justice Black, maintained instead that the majority's literal reading of the 1948 Act ignored not only the legislative history but "over a century of judicial history" as well. *Id.* at 523.

Justice Frankfurter, despite his willingness to hold Congress to the *Toucey* position, was not bound by his own opinions. Two years after *Amalgamated Clothing Workers*, he no longer understood § 2283. Referring to it as an "ambiguous statute," he wrote for the Court:

> The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone.

Leiter Minerals v. United States, 352 U.S. 220, 225-26 (1957).

stitution"[150] framed during Reconstruction. To do so would have been an

Justice Black took up the task of parsing § 2283 in Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970), where he rejected a latitudinarian approach to the Act. Disapproving "loose statutory constructions," he relied upon *Amalgamated Clothing Workers* without mention of the dissenting opinions he had joined in that case. The flexibility urged by his fellow dissenters gave way in *Atlantic Coast Line* to a rigidity reminiscent of Justice Frankfurter's opinions, and foreshadowing the sclerosis of the *Younger* doctrine. Justice Black found the "questions are by no means simple and clear," *id.* at 284, but the general prohibition of § 2283 required resolving doubts "in favor of permitting state courts to proceed in an orderly fashion to *finally determine* the controversy." *Id.* at 297 (emphasis added). Paradoxically, it appears throughout the cases that, but for the Act, the difficult questions would have been resolved in favor of federal relief. In the post-*Younger* world, there would have been no questions at all.

Even after *Atlantic Coast Line* and *Younger*, however, § 2283 continued to produced unexpected alignments and opinions. *Compare* NLRB v. Nash-Finch, 404 U.S. 138 (1971)(frustration of "superior federal interests" justifies implied exception), *with* Vendo Co. v. Lektro-Vend Corp., 97 S. Ct. 2881, 2892 (1977)(Clayton Act, 15 U.S.C. § 26, not an express exception because does not "necessarily interact with, or focus upon, a state judical proceeding").

It is essential to grasp that nothing is truly clear about the Anti-Injunction Act. Its origins are obscure and the Court's interpretations are inconsistent. Even Justice Frankfurter's assertion in *Toucey* that the Act originated primarily in Congress' fear and loathing of equity is insufficient to support a restrictive attitude in the area of civil liberties. Whatever fear Congress may have had of equity in 1793, by 1871 it believed that changed conditions warranted the specific grant to federal courts of equity powers contained in the Civil Rights Act. *Cf.* Comment, *supra* note 127 (reliance on Anti-Injunction Act for broader policy doubtful in light of prohibition solely of injunctions, and not of common law writs). But the decisions from *Younger* to Trainor v. Hernandez, 97 S. Ct. 1911 (1977), make it appear that § 2283 represents a seamless web of theory and practice consistent with Our Federalism, and perhaps compelling it. In fact, the Anti-Injunction Act, like the notions of comity and federalism, is a palimpsest, and it shows the traces of all the discrepant inscriptions written across time. The *Younger* doctrine has been built from only some of those traces by a selective system of citation, drawing from one side of a debate as old as the nation, a debate whose very existence the doctrine denies.

The penetrating candor of a statement by Professor Frankfurter on the subject may to a degree shield him from the abuse his opinions from the Bench invite. "[T]he doctrine of the separation of powers and the whole conception of our federalism," he wrote in 1936, were examples of those "vague or purposely ambiguous or large dynamic conceptions" for whose interpretation "the precedents are sufficiently open or sufficiently conflicting to permit the Court to choose either one series or the other as the starting point. And the choice of premise usually pre-determines the conclusion." FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 124, at 336-37.

150. The phrase is usually attributed to the Beards, but it is used frequently by other historians. *See, e.g.*, C. WOODWARD, REUNION AND REACTION 3 (rev. ed. 1966). Harold Hyman has remarked that "dating the Constitution's birth or at least maturity from 1865 instead of 1787 is a reasonable way of looking at the past." *Reconstruction and Political-Constitutional Institutions: The Popular Expression*, in NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION 3 (H. Hyman ed. 1966). The point that the Civil War amendments radically altered the structure of federalism has been accepted by scholars of very diverse views. *See, e.g.*, J. HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 35 (1977); A. BICKEL, THE LEAST DANGEROUS BRANCH 101 (1962). Justice Rehnquist, however, appears to share Justice Black's fixation upon the Framers, as though theirs were the last word on federalism, not merely the first. *See* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 175-77, 181-88 (1969). Justice Rehnquist, in a passage that reveals much about his view of history and of the origins of restraint upon federal power, has written: "Surely there can be no more fundamental *constitutional* question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments." Fry v. United States, 421 U.S. 542, 559 (1975)(Rehnquist, J., dissenting) (emphasis added). Much of Justice Rehnquist's dissenting opinion in *Fry*, with its totemic regard for the Framers and its approach to federalism as a constitutional matter, became the Court's opinion in National League of Cities v. Usery,

admission that an alternative view existed, and that the choice made by the Court in *Huffman* was one of judicial policy and judicial will. Justice Rehnquist was more concerned with applying Our Federalism to the facts of *Huffman* than with explaining the doctrine itself. Justification for extending the doctrine beyond the pale of pending criminal prosecutions had to be found outside equity. He was obliged, therefore, to move away from the narrowest and least debatable element of *Younger*, that equity will not restrain a pending prosecution. Instead, he emphasized the broadest and most doubtful considerations raised by Justice Black, the policy of non-interference exemplified—but not compelled—by the Anti-Injunction Act, and the notion of comity as a broad and independent restraint on federal judicial power.

Justice Rehnquist liberated Our Federalism from its equitable underpinnings by asserting that the Court had "consistently required" that federal courts, asked to intervene in pending state civil proceedings, "should abide by standards of restraint that go well beyond those of private equity jurisprudence."[151] He illustrated that consistent requirement by citing *Massachusetts State Grange v. Benton.*[152]

Massachusetts State Grange concerned a suit to enjoin enforcement of a statewide daylight savings time program on the grounds that it was preempted by federal legislation. The opinions of both the three-judge district court below[153] and of Justice Holmes for the Court are clear that the legal challenge to the validity of the state law was weak, and that plaintiff made no credible showing of irreparable injury. By "the standards of private equity jurisprudence," therefore, an injunction could not reasonably have been expected. Further, neither opinion mentions the pendency of civil or criminal state proceedings at the time the federal suit was filed. The case, on its facts, does little to establish the existence, much less the uniform consistency, of the tradition Justice Rehnquist claimed it epitomized. More

426 U.S. 833, 852-55 (1976). *See also* Edelman v. Jordan, 415 U.S. 651, 660 (1974). For Justice Rehnquist's generally restrictive views of the scope of the fourteenth amendment, see Cruz v. Beto, 405 U.S. 319, 325-26 (1972) (dissenting opinion), one of his earliest efforts from the Bench, maintaining that the fourteenth amendment was intended as a remedial racial measure and did not apply to prisoners. *See also* Trimble v. Gordon, 430 U.S. 762, 777-78 (1977) (Rehnquist, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 290 (1976) (dissenting opinion); Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (dissenting opinion) (applicable also to *In re* Griffiths, 413 U.S. 717 (1973)). *But see* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), in which Justice Rehnquist for the Court determined that § 5 of the fourteenth amendment restricted the eleventh amendment. *See generally* Rehnquist, *The Notion of the Living Constitution*, 54 TEXAS L. REV. 693 (1976).

151. 420 U.S. at 603.

152. 272 U.S. 525 (1926).

153. 10 F.2d 515 (D. Mass. 1925).

importantly, the *Massachusetts State Grange* language was dictum qualified by a remark that the question was one of discretion, not of federal judicial power.[154]

Nonetheless, Justice Rehnquist concluded from *Massachusetts State Grange* that "[t]he component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding."[155] That proposition has nothing to do with equity and irreparable injury to an individual litigant, but expresses only a purely systemic concern based in comity. It is consistent with views expressed elsewhere by Justice Rehnquist,[156] and is even defensible as a statement of personal opinion; it is decidedly unpersuasive, however, as a statement of the Court's settled practice. Justice Rehnquist failed to explain and to reconcile a line of cases, running from *French v. Hay*[157] in 1875 to *Mitchum* in 1972, in which the Court regularly enter-

154. Justice Holmes, citing Fenner v. Boykin, 271 U.S. 240 (1926), in passing stated that no injunction ought to issue "unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." 272 U.S. at 527. In *Huffman*, Justice Rehnquist quoted Holmes only that far, perhaps in the belief that Holmes not only embraced *Fenner* as a limit upon jurisdiction but meant to expand upon traditional equitable notions restraining federal judicial interference with state functions. Justice Holmes went on to write—as Justice Rehnquist did not go on to quote—that courts "ought not say that there is no jurisdiction when they mean only that equity ought not to give the relief asked." 271 U.S. at 528. Justice Rehnquist's evident desire to wrap Our Federalism and *Huffman* in the mantle of Holmes is forgivable. His "umbrageous" use of Holmes' opinion in *Massachusetts State Grange* is not. *See* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

155. 420 U.S. at 604. The values expressed are consistent with the views of Charles Warren, who bemoaned the fact that the "very explicit words" of the Anti-Injunction Act had been "considerably stretched by the Court," so that "substantial breaches" had occurred. Warren, *supra* note 48, at 367. *See also* Durfee & Sloss, *supra* note 113, who concluded that "except for the prohibition, in some cases, of injunctions before judgment, the statute has long been dead." *Id.* at 1169. Justice Rehnquist's exclusive reliance on cases decided in 1926, several years before the cited articles were written, suggests there was not much material for him to work with. *See generally* note 149 *supra*. Professor Frankfurter again had the apt phrase: "And so the cases reflect an oscillation between a very strict and a very easy-going attitude toward taking equity jurisdiction to decide constitutionality." Frankfurter & Fisher, *The Business of the Supreme Court at October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 624 (1938).

156. Justice Rehnquist had once before discerned a broad tradition of comity "enunciated in earlier decisions of the Court dealing with civil as well as criminal matters," referring to cases cited in *Mitchum*. Cousins v. Wigoda, 409 U.S. 1201, 1205 (Rehnquist, Circuit Justice, 1972). The cases, indirectly cited were Cameron v. Johnson, 390 U.S. 611 (1968); Steffanelli v. Minard, 342 U.S. 117 (1951); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Williams v. Miller, 317 U.S. 599 (1942); Watson v. Buck, 313 U.S. 387 (1941); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935); Fenner v. Boykin, 271 U.S. 240 (1926). All these cases involved criminal sanctions.

157. 89 U.S. (22 Wall.) 250 (1874). *French* was the beginning of the "ancillary" exception to the Anti-Injunction Act, providing that a federal court could enjoin a subsequent state proceeding when necessary to assure the enforcement of a federal judgment. *See also* Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906); Deitzsch v. Huidekoper, 103 U.S. 494, 497-98 (1880). This exception, begun as an aid to removal jurisdiction, soon became characterized as applicable when a federal court acts in aid of its own jurisdiction to render its decrce effective.

tained suits to enjoin state civil proceedings on their merits. In some the Court did not pause even to consider whether section 2283 barred the suit.[158] In others, if the Anti-Injunction Act was found not to apply, the Court reached the merits and, applying the standards of equity, often granted relief.[159] The decisions do not rely upon comity apart from the

Julian v. Central Trust Co., 193 U.S. 93, 112 (1904). It was adopted by Congress as a specific exception to the Anti-Injuntion Act in the 1948 revision.

Another exception of ancient lineage is that allowing a federal court to enjoin the final judgment of a state court alleged to have been obtained by fraud or without due process. Marshall v. Holmes, 141 U.S. 589 (1891). For other exceptions, see Mitchum v. Foster, 407 U.S. 225, 233-35, nn. 11-17. *But see* Toucey v. New York Life Ins. Co., 314 U.S. 118, 132-39 (1941).

158. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); AFL v. Watson, 327 U.S. 582, 595 (1946) ("the bill states a cause of action in equity," despite pending quo warranto proceedings against three appellees). *See also* Douglas v. Noble, 261 U.S. 165 (1923), in which the Court reversed on the merits a district court injunction staying administrative proceedings against a dentist who had been arrested, whose case was pending, and who claimed he was threatened with future arrests. Justice Brandeis, writing in *Douglas*, simply ignored knotty jurisdictional problems.

159. The issue of whether the Anti-Injunction Act applied was viewed generally as determinative. In Wells Fargo Co. v. Taylor, 254 U.S. 175, 182 (1920), for example, the Court put the issue in simple terms: "is the suit one to stay proceedings in the sense of [the Anti-Injunction Act]? If it is, the District Court erred in not dismissing the bill on that ground . . . . If it is not, the court rightly entertained the suit and proceeded to an adjudication on the merits . . . ."

If the Act did not shield the state proceedings, no other rule of comity or federalism did so. Justice Van Devanter, in his opinion for a unanimous Court, found that the Act was "intended to give effect to a familiar rule of comity and like that rule, is limited in its field of operation." *Id.* at 183. To extend the Act beyond its limitations "would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated." *Id.* He then listed a dozen Supreme Court cases allowing injunctions in spite of the Act.

Wells Fargo limited the Act significantly by tying it to a loose notion of comity. In the 1920's Justice Holmes vitiated comity as a consideration in several opinions for the Court on the theme that concerns of comity must yield when constitutional rights are at stake. *See, e.g.*, Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196 (1924); Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 293 (1923). *Cf.* Railroad & Warehouse Comm. v. Duluth Street Ry., 273 U.S. 625 (1927) (exhaustion of state remedies—"merely a requirement of convenience or comity"—not required when constitutional right involved). *See generally* note 149 *supra*.

Even in cases in which the Anti-Injunction Act was found to bar equitable relief, such as Essanay Film Mfg. Co. v. Kane, 258 U.S. 358 (1922), it was recognized that the letter of the Act was often disregarded without offense to the spirit. In *Essanay* the Court held that a state proceeding was pending for purposes of the Anti-Injunction Act only to the point of final judgment. The Court's restriction of "proceedings" to the period prior to final judgment in *Essanay* was much criticized, *see* Durfee & Sloss, note 113 *supra*, and apparently rejected without citation in Hill v. Martin, 296 U.S. 393, 403 (1935). Despite its result, *Hill* is consistent with *Wells Fargo* and *Essanay* in that the focus of discussion is solely upon the Anti-Injunction Act; there is no reference to a more general notion of comity or federalism that may control cases otherwise excepted from the operation of the Act. *See also* Porter v. Dicken, 328 U.S. 252, 254-55 (1946) (Black, J.); Treinies v. Sunshine Mining Co., 308 U.S. 66, 74 (1939); Providence & N.Y. S.S. Co. v. Hill Mfg. Co., 109 U.S. 578, 599-601 (1883) (dictum).

The best that can be said for Justice Rehnquist's position is that the Anti-Injunction Act has not been treated consistently. His view does not comport well, however, with the notion that there is a right of access to federal courts. *See* England v. Louisiana State Bd. of Medical Exam'nrs, 375 U.S. 411, 415 (1964) (quoting Wilcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909)). During the conflict between the circuits over the relation of § 2283 and § 1983, the

Act.[160] The Court's definitions of "pending" and of "proceedings" changed back and forth over time, and the scope of the Act expanded and contracted accordingly. It would be a fair inference that changing notions of federalism and concern for comity affected the way the Court interpreted the Anti-Injunction Act and account in substantial part for the Court's oscillations. The question, however, was always the applicability of the Act as interpreted; it was never couched in terms of a notion of comity of which the Act was but a partial manifestation, and whose platonic essence the Framers had entrusted to the Court's own keeping. Justice Rehnquist's claim that the Court customarily went beyond those standards and applied a rigid standard of comity, to avoid reaching the merits when the Anti-Injunction Act did not apply, does not bear scrutiny. The cases he did not cite are strong evidence against him.[161] Had he contended only that, as of *Huffman*, the slate was blank, his contention would have been colorable, if not quite accurate. But he went further and, on this essential leg of *Huffman*, overreached himself.

Not satisfied with the invocation of Our Federalism, Justice Rehnquist maintained in the alternative that the state proceeding in *Huffman* was so much like a criminal prosecution that relief should be barred even under the traditional standards of equity he had transcended earlier in the opinion. To reach this conclusion, the Justice executed an analogical leap from "criminal prosecutions" to cases "akin to a criminal prosecution." Remarking that "*Younger* . . . also rests upon the traditional reluctance of courts of equity, even within a unitary system, to interfere with a criminal prosecution,"[162] he found that the Ohio nuisance action was "a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases."[163] As he moved from equity into arguments from the

Fourth Circuit charged the Third Circuit with "a denigration, unintentional of course, of the Congress" for having denied in Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950), an injunction on "equitable principles underlying or concomitant with Sec. 2283" after finding that § 1983 was an exception to that Act. Baines v. City of Danville, 337 F.2d 579, 591 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965). Justice Rehnquist's use of § 2283 as a metaphor rather than a statute in *Huffman* is subject to the same charge.

160. *See* notes 156-59 *supra*.

161. *Id.*

162. 420 U.S. at 604.

163. *Id.* Apparently the state's equivalent interest was inferred from two factors: 1) the presence of Ohio as a party to the nuisance proceedings; and 2) the Court's assumptions that the nuisance proceedings were "in aid of and closely related to criminal statutes" banning dissemination of obscene materials. *Id.* To support its assumption, the Court offered a "*Cf.*" citation to footnote 2 in Justice Stewart's concurrence to *Younger*, 401 U.S. 37, 55 (1971). That footnote reads in full:

> Courts of equity have traditionally shown greater reluctance to intervene in criminal prosecutions than in civil cases. See *ante*, at 43-44; *Douglas v. City of Jeannette*, 319 U.S. 157, 163-64. The offense to state interests is likely to be less in a civil proceeding. A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By

logic of Our Federalism for extending *Younger* to civil cases[164] and into elaboration of the exhaustion requirement—for which identical considerations of policy were urged—the basis of the *Younger* doctrine became comity and federalism alone. The word equity did not recur in the opinion.

In developing the second leg of *Huffman*, the redefinition of pendency to require exhaustion of state appellate remedies, Justice Rehnquist could not find any even colorably congenial cases to represent a consistent tradition. Early cases had established that a federal injunction could issue to restrain enforcement of a judgment obtained by fraud or without due process, even when the Anti-Injunction Act would have barred interference with the state proceedings prior to judgment.[165] By 1920, in the heyday of federal judicial interventionism, the Court was able to declare that a federal court could enjoin enforcement of a state court judgment whenever "recognized principles of equity and the standards of good conscience"[166] required it. The extravagance of that position was later curtailed by holdings that post-judgment proceedings, including appeals, were covered by the Anti-Injunction Act in cases to which the Act applied.[167] When the Civil Rights Act

> contrast, the State might not even be a party in proceeding under a civil statute. (citations omitted).
>
> These considerations would not, to be sure, support any distinction between civil and criminal proceedings should the ban of 28 U.S.C. § 2283, which makes no such distinction, be held unaffected by 42 U.S.C. § 1983.

The Court's reference to that footnote was comparative, and perhaps intended only to convey that the views expressed there by Justice Stewart were now rejected, as was in fact the case. The disturbing possibility remains, however, that Justice Rehnquist was not averse to encouraging the inference that Justice Stewart's position had always been identical to his own. In fact, the cited footnote cut against Justice Rehnquist's contention that the Court had "consistently required" federal courts to be governed by "standards of restraint that go well beyond those of private equity jurisprudence" when asked to interfere with state civil functions. 420 U.S. at 603. Although Justice Stewart did join the Court's opinion in *Huffman*, his stinging dissent to Hicks v. Miranda, 422 U.S. 332 (1975), suggests he had second thoughts, "closely akin" to those expressed in the footnote to his concurrence in *Younger*. *See* Juidice v. Vail, 430 U.S. 327, 347-48 (1977), discussed *infra* at notes 217-44, in which Justice Stewart urged *Pullman* abstention instead of extending *Huffman* to another category of civil cases.

Justice Rehnquist suggests in *Huffman* that to determine whether a state civil statute is sufficiently related to a criminal statute, the test is whether the state's interest in the particular civil litigation is "likely to be every bit as great as it would be were this a criminal proceeding." 420 U.S. at 604. Ironically, the doctrine intended to reduce the frictions of federalism requires federal judges to inquire into a state's underlying policy choices in its criminal law, and to compare those choices with noncriminal enactments in the state's statutory scheme. Evidently disquieted by this irony and reluctant to revert to the *status quo ante Huffman*, the Court struck out for the farther shore, extending the *Younger* doctrine to novel civil cases. *See* Trainor v. Hernandez, 97 S. Ct. 1911 (1977); Juidice v. Vail, 430 U.S. 327 (1977); notes 217-44 & 265-89 *infra*.

164. 420 U.S. at 604.

165. *See* note 157 *supra*.

166. Wells Fargo Co. v. Taylor, 254 U.S. 175, 183 (1920).

167. *See* Hill v. Martin, 296 U.S. 393, 403 (1935); Riehle v. Margolies, 279 U.S. 218, 225 (1929); *see generally* note 149 *supra*. *But cf.* Lynch v. Household Fin. Corp., 405 U.S. 538

emerged from its long desuetude, however, courts did not require exhaustion of state remedies in section 1983 actions, whether or not the Anti-Injunction Act applied. The Supreme Court held that the purposes of the Civil Rights Act would be defeated "if we held that assertion of a federal claim must await an attempt to vindicate the same claim in a state court."[168] When the *Mitchum* Court found section 1983 contained an expressly authorized exception to the Anti-Injunction Act, civil rights suits thus became doubly insulated from any exhaustion requirement.[169]

Except for one disingenuous statement in a footnote[170] that *Huffman* was not intended to undermine *Monroe v. Pape*,[171] Justice Rehnquist ignored both the prior cases and the policies behind section 1983. Instead, he characterized Pursue's action as one "designed to annul the results of a state trial."[172] Such a formulation richly vindicates comity at the expense of any equitable considerations. *Huffman*'s exhaustion requirement, buttressed by the rigidity of the *Younger* doctrine, may turn out to be a more formidable limitation upon federal jurisdiction than the imposition of res judicata would have been, and a considerable disruption of established rules of concurrent in personam jurisdiction.[173] The Court, however, simply de-

(1972), in which Justice Stewart limited *Hill* by holding that prejudgment garnishment, without judicial supervison, would not necessarily constitute a state court proceeding under § 2283, because it would not necessarily support a subsequent judgment. Justice White, in a dissent joined by the Chief Justice and Justice Blackmun, claimed that the majority "rejects not only *Hill v. Martin* but also a substantial body of federal court of appeals law to the effect that § 2283 bars federal court interference with executions on state court judgments." *Id.* at 559.

168. McNeese v. Board of Educ., 373 U.S. 668, 672 (1963). *See also* Ellis v. Dyson, 421 U.S. 426 (1975); Damico v. California, 389 U.S. 416 (1967); Monroe v. Pape, 365 U.S. 167 (1967). *Cf.* Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968) (criticizing the *Damico* decision). On problems of exhaustion and res judicata generally, see note 173 *infra*.

169. The point was sufficiently well-established that only two months after *Huffman*, the Court observed that it had "long held" § 1983 free of the exhaustion requirement, omitting any mention of *Younger* or *Huffman*. Ellis v. Dyson, 421 U.S. 426, 432 (1975).

170. 420 U.S. at 609 n.21.

171. 365 U.S. 167 (1961).

172. 420 U.S. at 609.

173. The Court noted that it did not wish to imply "that the normal rules of res judicata and judicial estoppel do not operate to bar litigation in actions under 42 U.S.C. § 1983 of fedcral issues arising in state court proceedings." *Id.* at 606 n.18. These judicial policies seem inappropriate in the rigid context of Our Federalism since competing interests can foreclose application of res judicata and collateral estoppel. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-54, 49 n.10 (1974) (congressional intent in establishing Title VII as *supplementary* remedy against racial discrimination requires denial of res judicata or collateral estoppel effect to arbitration award in subsequent Title VII suit); *In re* Penn Central Trans. Co., 384 F. Supp. 895, 916-17 (Sp. Ct. Reg. Rail Reorg. Act 1974). This is especially likely when important *federal* policies, embodied, for example, in § 1983, would be compromised by granting such effect to state judgments. *Cf.* United States Fidelity & Guar. Co. v. Hendry Corp., 391 F.2d 13 (5th Cir. 1968) (Millcr Act surety not bound by state judgment against principal, despite management of defense, to prevent evisceration of exclusive federal jurisdiction of Miller Act suits); Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir. 1955) (L. Hand, J.) (grant of exclusive

clared that federal interference after a state court judgment offended the considerations of comity and federalism underlying *Younger*. *Younger* was

jurisdiction to federal district court under Clayton Act forecloses application of estoppel to antitrust claim asserted as a defense to breach of contract suit in state court). Many of these policies are elevated as matters of exclusive federal jurisdiction, and the considerations involved are not strictly applicable to § 1983 cases. *See* Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Determinations*, 53 VA. L. REV. 1360 (1967). Lower federal courts have held that res judicata is applicable to § 1983 actions. *See* cases collected in Ellis v. Dyson, 421 U.S. 426, 440-41 n.6 (Powell, J., dissenting). *But cf.* Wageed v. Schenuit Indus., Inc., 406 F. Supp. 217 (D. Md. 1975) (res judicata inapplicable to actions brought pursuant to 42 U.S.C. § 1981, the Civil Rights Act of 1866). In *Alexander*, however, the Court relied not on the exclusivity of federal jurisdiction over the Title VII remedy, but on the intent of Congress to provide a remedy supplemental to other causes of action. If Monroe v. Pape, 365 U.S. 167 (1964); McNeese v. Board of Educ., 373 U.S. 668 (1963); and Damico v. California, 389 U.S. 416 (1967), are viable, it would be difficult to hold that res judicata should apply in full force to civil rights actions under § 1983. *But see* Mertes v. Mertes, 350 F. Supp. 472 (D. Del. 1972), *aff'd summarily*, 411 U.S. 419 (1973). The proper effect to be given res judicata or collateral estoppel is never an easy problem in the framework of federalism. *See generally* Averitt, *Federal Section 1983 Actions After State Court Judgment*, 44 U. COLO. L. REV. 191 (1972); Theis, *Res Judicata in Civil Rights Cases: An Introduction to the Problem*, 70 NW. U. L. REV. 859 (1976); Torke, *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9 IND. L. REV. 543 (1976); RESTATEMENT SECOND OF JUDGMENTS, § 68.1 (Tent. Draft No. 3, 1973).

Indeed it is so difficult a problem that Justice Powell, who collected cases on the point in his dissenting opinion in Ellis v. Dyson, 421 U.S. 426, 437 (1975), missed a summary affirmance by the Court two terms earlier in Mertes v. Mertes, 350 F. Supp. 472 (D. Del. 1972), *aff'd summarily*, 411 U.S. 419 (1973), which, if the rule on summary affirmances of Hicks v. Miranda, 422 U.S. 332 (1975), *see* note 206 *infra*, is given full effect, might have been thought to apply res judicata in civil rights cases. The Court in *Huffman* noted that the application of res judicata to § 1983 remains open. 420 U.S. at 606 n.18. The exhaustion requirement, however, largely pre-empts that question.

The exhaustion requirement also appears to impinge drastically upon the established rule that neither state nor federal courts can oust the other from concurrent in personam jurisdiction. *See* Kline v. Burke Constr. Co., 260 U.S. 226, 230-32 (1922). As Justice Black put it, "state courts are completely without power to restrain federal-court proceedings in in personam actions . . . ." Donovan v. City of Dallas, 377 U.S. 408, 413 (1964). The rule was an element of Justice Black's ruling that § 2283 foreclosed issuance of an injunction in Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970), since an injunction could issue consistent with the Act only if necessary in aid of the district court's jurisdiction. *Id.* at 296. In § 1983 actions, however, some interference with state laws, their enforcement, state proceedings, or judgments is normally an element of the relief requested. Under Our Federalism as extended in *Huffman* to preclude suits "designed to annul the results of a state trial," federal courts may no longer even enter the race to judgment, nor exercise their concurrent jurisdiction after the state proceedings are ended. If the Court were prepared to exempt declaratory relief from the coverage of the *Younger* doctrine on the grounds that it was a less intrusive form of federal interference, the problem would be alleviated. But the lower court in *Huffman* awarded both declaratory and injunctive relief, and the Court's reversal was not confined to the injunction. *See also* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), and Ellis v. Dyson, 421 U.S. 426 (1975), in which the declaratory judgment question was not clarified.

There are additional, more technical problems with the blithe enunciation of the exhaustion requirement in *Huffman*. Justice Rehnquist's attempt to distinguish prior cases in which exhaustion had not been required on the ground that they involved administrative proceedings, 420 U.S. at 610 n.21, is based upon a misreading of those and contemporaneous cases.

Contrary to the impression Justice Rehnquist conveys, the rule had been that if state courts reviewing state administrative rate orders were deemed to be performing an administrative function, appeals were required to be exhausted; if, however, the state courts were performing a judicial function, recourse could be had to the federal courts forthwith. *See* Prentis v. Atlantic

found to require federal courts to avoid action that might disrupt a state's efforts to protect interests it deems important; result in duplicative proceedings; or reflect negatively upon the ability of state judges to enforce constitutional principles by interfering with the availability of a state forum for constitutional litigation.[174]

Huffman expanded the *Younger* Doctrine on two fronts, and opened the doors for further expansion as well. By eliminating the distinction drawn in *Younger* between criminal and noncriminal cases, and looking instead to an assessment of the intensity of a state's interest in proceedings sought to be enjoined, the Court enlarged the scope of Our Federalism in terms of subject-matter without indicating what limits, if any, there might be on further enlargement. By discovering an exhaustion requirement in Our Federalism, the Court attracted attention to definitions of "pendency" as a means of expanding or contracting the applicability of Our Federalism without regard to the nominal character of the state proceedings. The basis was thus laid for developing the doctrine along both axes—character of the state's interest and definition of pendency—by playing the two conceptions like an accordion, expanding or contracting as circumstances and policy might appear to require in particular cases. The Court had played a similar game with the Anti-Injunction Act,[175] but the statute limited the Court's discretion, and equity was not eliminated as a consideration. After *Huffman*, the Court is limited only by such rules as it cares to devise.

This view of "comity and federalism" reflects an obsessive concern with conflict between the state and national sovereigns. It addresses prob-

Coast Line Co., 211 U.S. 210 (1908); Bacon v. Rutland R.R., 232 U.S. 134 (1914). Justice Holmes, who began the inquiry into the state court function in *Prentis*, discounted both the importance of comity and sanctity of state proceedings in Oklahoma Gas Co. v. Russell, 261 U.S. 290 (1923), when he declared that "rules of comity or convenience must give way to constitutional rights." 261 U.S. at 293. *See also* City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24 (1934).

174. 420 U.S. at 604, 608-09.

The second point cannot be taken seriously. Justice Rehnquist threw the concern for duplicative proceedings to the wind several weeks after *Huffman*, in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). In *Doran* the Court affirmed the grant of preliminary injunctive relief to two federal plaintiffs but reversed as to the third, in effect splitting the same legal issue between a state trial court and a federal district court. Justice Rehnquist wrote that the very existence of a dual system "suggests that on occasion there will be duplicating and overlapping adjudication of cases which are sufficiently similar in content, time and location to justify being heard before a single judge had they arisen in a unitary system." *Id.* at 928.

Some duplication, and attendant friction, are inevitable, unless the Court not only assigns initial responsibility for trying claims of federal rights in conflict with state laws to state courts, but applies res judicata or collateral estoppel to state judgments. *See* note 173 *supra*.

175. *See* note 149 *supra*.

lems of the structure of the Republic, not the rights of people who live in it. The "comity" of Our Federalism, purportedly an approach to balance judicial power between state and federal judicial power, turns out in practice to be a mandate to federal courts to give way. It places scant weight upon federal equity jurisdiction, on the statutes conferring it, or on the rights of individuals[176] who seek to invoke federal protection.[177] It is implicit in *Huffman* that the anti-federalists prevailed in the ratification debates in placing the locus of sovereignty in the states instead of the people,[178] and that nothing since those debates, not even the Civil War, need be considered in allocating responsibility for adjudicating conflicts between state laws and federal rights. The opinions of the Framers are the beginning of inquiry about federalism, not the end.[179] The Framers themselves were not nearly so certain as a majority of the present Court appears to be that federal courts need not be available, concurrently with state courts, to protect federal rights.[180] Marshall and Story, both of whom the Court might admit as authorities, doubted the adequacy of state courts and judges for that purpose. In *Martin v. Hunter's Lessee*[181] Story wrote of the constitutional

176. The rights concerned include the right to choose a federal forum. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) ("the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 516-17 (1972) (Powell, J., dissenting); Donovan v. City of Dallas, 377 U.S. 408, 413 (1964) (Black, J.) (a federal litigant's right to pursue federal remedies "was granted by Congress and cannot be taken away by the State"); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

The original expression of this rule is that of Chief Justice Marshall in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821):

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

177. Justice Rehnquist's emphases, indeed his very language, echo the objections of the first Justice Harlan, dissenting to *Ex parte Young*. He, too, asserted that "a decent respect for the States requires us to assume . . . that the state courts will enforce every right secured by the Constitution," 209 U.S. 123, 176 (1908), and he also argued that the right of appeal to the Supreme Court was sufficient protection for the federal rights asserted. In his day, the notion of appeal as of right had some substance. For a similar congruity of language *compare Ex parte* Young, 209 U.S. 123, 175 (1908) (Harlan, J., dissenting), *with* Elrod v. Burns, 427 U.S. 347, 375 (1976) (Burger, C.J., dissenting).

178. *See generally* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 524-43 (1969), and sources cited therein. "The fundamental notion of the Federal idea . . . rested both the state and federal governments on the consent of the people, rather than making the federal government the creature of the states." A. KOCH, MADISON'S "ADVICE TO MY COUNTRY" 91 (1966).

179. Justice Rehnquist, however, seems to regard the unamended Constitution as a "gift" of the Framers. Edelman v. Jordan, 415 U.S. 651, 660 (1974). *See also* Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

180. *See, e.g.*, Madison's speech reported in 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 159 (J. Elliott ed. 1937); note 137 *supra*. Hamilton wrote on the need to avoid "prevalency of the local spirit" by establishing a federal judiciary. THE FEDERALIST, Nos. 80 & 81 at 499-514 (B. Wright ed. 1961).

181. 14 U.S. (1 Wheat.) 304 (1816).

presumption that "state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice," and suggested that a grant of exclusive jurisdiction to the federal courts might be justified for "cases arising under the constitution, laws and treaties of the United States . . . ."[182] Marshall, in *Cohens v. Virginia*,[183] doubted that the Constitution contemplated leaving to state tribunals, whose judges had not the independence of federal judges, "cases where a State shall prosecute an individual who claims the protection of an act of Congress."[184] The Framers cannot be said to have considered so lopsided a states' rights doctrine as Our Federalism to be compelled by comity or federalism, and there was no plain line of development consistent with such a doctrine prior to the Civil War. That conflict affected the balance of judicial power as it did the concept of federalism more generally. The fourteenth amendment and the Civil Rights Acts produced a "new structure of law"[185] foreign to the concept of Our Federalism.

Reference to a single doctrine or line of cases cannot determine the proper role of federal courts in litigation concerning federal rights. That role varies with the attitudes taken by succeeding generations to the grandly political problem of federalism itself.[186] Basic considerations for preserving access to lower federal courts, however, remain constant. The most obvious is that Congress has expressly provided a means of access through section 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343. Even though the conferral of jurisdiction does not compel the issuance of an injunction,[187] the fashioning of a rule entirely precluding consideration of the merits of an

182. *Id.* at 347.

183. 19 U.S. (6 Wheat.) 264 (1821).

184. *Id.* at 387. *See also* note 176 *supra*. Marshall's point retains its force, as many state judges enjoy neither the guaranteed salary nor the tenure during good behavior of federal judges. *See* Shaman & Turkington, *supra* note 2, at 925 n.145. *See also* Murphy, *Lower Court Checks on Supreme Court Power*, in THE IMPACT OF SUPREME COURT DECISIONS 68-71 (T. Becker ed. 1969); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127-28 (1977); Sedler, *The* Dombrowski*-type Suit As An Effective Weapon For Social Change: Reflections From Without and Within*, 18 KAN. L. REV. 237, 254-55 (1970).

185. Mitchum v. Foster, 407 U.S. 225, 239 (1972). *Mitchum*, Steffel v. Thompson, 415 U.S. 452 (1974), and Monroe v. Pape, 365 U.S. 167, 180 (1961), provide a compendium of the Court's recent statements of this restructuring. Curiously, most of the recent decisions affirming the primacy of federal courts, including *Steffel*, were written by Justice Brennan, the only member of the present Court with experience on the state bench. Justices Rehnquist and White, on the other hand, whose attachment to *Younger* leads them toward a theory of devolution of power to state courts, were, until the more recent arrival of Justice Stevens, the only Justices with previous experience as Supreme Court clerks. Perhaps familiarity breeds contempt.

186. *See* note 132 *supra*.

187. Whether Congress could make the issuance of an injunction mandatory is a delicate question, both of the separation of powers and of the nature of those powers, which the Court has been careful not to decide. *See* Hecht Co. v. Bowles, 321 U.S. 321, 328-30 (1944).

equitable plea is abrogation of the duty imposed by the statute and, to that extent, judicial interference with the proper exercise of congressional power.

There are also compelling practical reasons for preserving access to federal courts. First, the federal claimant has a significant interest in trying a claim of federal right in a forum in which the issues raised are familiar.[188] As Justice Holmes observed in 1908, determination of the federal rights of a plaintiff "turns almost wholly upon the facts to be found."[189] When a state court finds the facts, ultimate review on appeal in the Supreme Court may be inadequate relief, even if plaintiff succeeds in obtaining it. The Court in *Huffman*,[190] however, denigrated the proposition that "the right of a plaintiff to choose a Federal court where there is a choice cannot properly be denied."[191]

Apart from the individual interest in a federal forum, there is a national interest in uniformity of federal rights that goes beyond the presumptively greater familiarity federal judges have with federal law. The federal judiciary is a more collegial body than the state judiciary. Federal judges sit with one another both within circuits and across circuits by assignment. That is an example of one of the "[n]umerous intangible forces [that] tend to make federal judges loyal to the influence as well as the command of the Supreme Court . . . . In contrast, there is relatively little beyond the constitutionally required oath that binds the more than 200 state supreme court judges to the United States Supreme Court."[192]

188. As one commentator put it:

> State court judges try predominantly state cases and must concentrate on incorporating superior state court rulings into their legal lexicon. Moreover, those federal questions that they do hear must ascend through so many levels of state appellate review before reaching the United States Supreme Court as to insulate the trial court effectively from direct federal review. This combination of insulation and infrequency limits the state judge's incentive to familarize himself with the intricacies of federal decisions . . . . A plaintiff whose federal claim is in any way novel may expect, then, a more educated analysis from federal courts than from state remedial tribunals—judicial or administrative.

Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1357-59 (1970), in answer to Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486 (1969). *See also* Neuborne, *supra* note 184, at 119.

189. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 228 (1908).

190. 420 U.S. at 606.

191. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-16 (1964). *See generally* note 176 *supra*.

192. Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 959-60 (1976). Even those 200 state supreme court judges may be bound more effectively than the multitude of state trial judges, before whom claims of federal right will be heard in the first instance. For a similar approach, see the views of Mr. Chevigny, note 188 *supra*.

The Court did not effectively rebut these considerations by saying that the federal claimant is "assured of eventual consideration of its claim by this Court."[193] Such an assurance, even if credible, would not effectuate policies served by federal trial courts, nor comply with the statutes providing them. In fact, the Court knows the federal claimant is *not* assured of this ultimate review.[194]

Surely there are sound reasons to justify a federal court staying its hand in the exercise of its equitable jurisdiction to avoid needless disruption of proper state court functions.[195] The presumption implied in that position, however, is reversed in Our Federalism. That doctrine is addressed to the sensibilities of the states, not to the situation of a plaintiff to whom the monetary, psychological, and temporal costs of exhausting state remedies make the ultimate federal forum a luxury.[196] The systemic emphasis of the *Younger* doctrine deletes the individual concern of equity from the calculus. From fear of reflecting negatively upon state judges, the *Huffman* Court implicitly denigrated federal judges by curtailing their exercise of discre-

193. 420 U.S. at 605.

194. Stolz, *supra* note 192, at 959, remarks that "federal questions in state courts are being finally resolved by state courts. It is not possible today for the United States Supreme Court to maintain more than token supervision of the resolution of federal law questions by the state courts." On the basis of a questionnaire sent to a statistically insignificant number of state supreme court judges by the Commission on Revision of the Federal Court Appellate System, it appears that some state supreme court judges feel they receive inadequate supervision from the Supreme Court on federal questions. *Id.* at 959 n.50.

Shaman & Turkington, *supra* note 2, at 927 n.160, report statistics concerning the scant number of appeals from state courts that the Supreme Court considers. *See also* Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 346-48 (1975).

In 1929 Frankfurter and Landis celebrated the demise of the "obstinate conception that the Court was to be the vindicator of all federal rights," noting, "[t]his conception the Judges' Bill (of 1925) completely overrode" by leaving all litigation "which did not represent a wide public interest" to the lower state and federal courts. Frankfurter & Landis, *A Study in the Federal Judicial System*, 40 HARV. L. REV. 834, 839-40 (1929). *See* Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 98 n.16 (1974).

195. For example, the holding in Stefanelli v. Minard, 342 U.S. 117 (1951), seems a wholly appropriate discretionary restriction upon federal court interference in an ongoing state criminal proceeding. Indeed, the discretionary approach in federal equity prior to *Younger* would be appropriate, though of course there would continue to be disagreement about what constitutes irreparable harm or exceptional circumstances sufficient to justify equitable intervention. For an interesting attempt to evolve standards in the post-*Younger* world, see Zeigler, *supra* note 2. Also, several forms of abstention exist that do not deprive federal courts of discretion and jurisdiction. *See generally* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-17 (1976) (Brennan, J.).

196. *Cf.* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 516-17 (1972), in which Justice Powell, joined in dissent by Chief Justice Burger, wrote, "[t]he relegation to state courts of this important litigation . . . is likely to result in serious delay, substantial expense to the parties (including the State), and a prolonging of the uncertainty which now exists." Although no individual civil liberties were at stake and only *Pullman* abstention was ordered, Justice Powell's concerns remain at least as valid in civil rights actions.

tion. Solicitude for the *amour-propre* of state judges is doubtless becoming, but not to the extent of allowing otherwise proper claims of federal right to be lost in the exchange of judicial courtesies.

Paradoxically, the *Younger* doctrine is more likely to foment than to foreclose disruptive confrontations between state and federal courts. Under *Younger* and *Huffman*, the federal district court may properly intervene when the state proceeding is motivated by a desire to harass or is conducted in bad faith, "or when a statute is flagrantly and patently unconstitutional."[197] *Younger* and *Huffman* demand a showing of systemic abuse, not of individual hardship. Such a showing would intrude on areas of the utmost sensitivity in the structure of Our Federalism. There could hardly be a greater slur upon the fidelity of a state court judge to his constitutional oath, or upon his capacity to observe it, than to declare that such a judge is unable either to prevent bad faith prosecutions or to support the flagrant constitutional defects in state statutes required by the *Younger* exception. The bare inquiry into such a possibility in order to discern an exception to the doctrine invites the friction between state and federal courts the *Younger* doctrine sought to foreclose.

Justice Rehnquist wrote in *Huffman* that the appellee was "in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities."[198] That formulation of the problem permits only one response—denial of relief. The primacy of federal courts in cases of federal rights could be supported by reference to statutory right, to the plaintiff's legitimate interest in having the facts found in a court thought hospitable to the merits, to the greater experience and familiarity of federal judges with federal law, and to the importance of national uniformity in determinations of the scope of federal rights. All of those considerations could support a preference for the "juster justice"[199] of the federal courts with no unseemly suggestion of faithlessness or incompetence in state judiciaries. The language Justice Rehnquist employed, however, cast the question in terms that effectively preclude federal equitable relief except under circumstances that would meet the restrictive standards under the statute for removal in federal civil rights cases.[200]

197. 420 U.S. at 611.

198. *Id.*

199. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513 (1954). *See generally* Neuborne, note 184 *supra*.

200. 28 U.S.C. § 1443 (1970). *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1225-30 (2d ed. 1973). There is an appealing appearance of consistency in limiting exceptions to Our Federalism to the extremely narrow range of circumstances that would support civil rights removal, but the

"Comity will have been bought at too great a cost"[201] if the plaintiff in a section 1983 action must demonstrate that "it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts."[202] This standard requires a federal judge to withhold relief from a party whose suit falls within the statutory jurisdiction unless he is prepared, in effect, to certify the state judge as incompetent or the state judicial system as inadequate.[203] With that element in the scale, comity and federalism compel withholding of relief and leave little to the discretion of the district judge. That result conflates federal plaintiffs attempting to use their federal rights as a sword with state defendants attempting to use them as a shield.

Although there are encouraging signs of increased sensitivity to claims of federal rights in some state courts,[204] hope alone, no matter how justified, is an inadequate basis for the establishment of state courts as the primary arbiters of allegations of state violations of federal rights. Congress has not subsumed section 1983 into section 1443, and the Supreme Court has no prerogative to effect the merger.

argument is contrary in letter and in spirit to the congressional command—even as that command has been narrowed by the Court's interpretation of the removal power in Georgia v. Rachel, 384 U.S. 780 (1966), and City of Greenwood v. Peacock, 384 U.S. 808 (1966).

201. Johnson v. Mississippi, 425 U.S. 352 (1975) (Marshall, J., dissenting, joined by Brennan, J.).

202. Georgia v. Rachel, 384 U.S. 780, 800 (1966).

203. Even during the heat of civil rights litigation, when petitioners' claims enjoyed the support of a broad national consensus and of both political branches of the federal government, the federal judiciary was understandably slow to act as though the courts of southern states were truly hostile to claims of federal right, or incompetent to adjudicate them. Instances in which federal courts actually declared them hostile or incompetent, the practical requirement of the removal statute, are few. *See, e.g.*, Frinks v. North Carolina, 468 F.2d 639 (4th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); Perkins v. Mississippi, 455 F.2d 7 (5th Cir. 1972); Student Non-Violent Coordinating Comm. v. Smith, 382 F.2d 9 (5th Cir. 1967); Wansley v. Virginia, 368 F.2d 71 (4th Cir. 1966); Heymann v. Louisiana, 269 F. Supp. 36 (E.D. La. 1967). The Supreme Court has sustained only one on review. Georgia v. Rachel, 384 U.S. 780 (1966). Federal courts are unlikely to be more liberal in finding similar conditions met on behalf of a "peddler of porn" or a shopping center picketer. That the Supreme Court would uphold such a decision is even less likely. More importantly, barriers to access and rigid limits on the exercise of statutory jurisdiction are difficult to reconcile with any legitimate consideration of federalism. A more balanced view, which evaluates the varying experience and expertise of state and federal judges rather than bad faith, the rights asserted, and the legislative intent in creating federal jurisdiction *might* still support a result agreeable to Justice Rehnquist. As an added bonus, this analysis would require the writing of opinions more intellectually compelling than that in *Huffman*. *See* ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 206 (1969).

204. *See* Brennan, *supra* note 17; Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, *supra* note 2, at 87 n.119; Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533 (1976). *But see* State v. Phillips, 540 P.2d 936 (Utah 1975).

IV. Our Federalism After *Huffman*

Huffman was a crucial step in the development of Our Federalism. By its invocation of *Younger* in a case to which the *Younger* doctrine by its original terms did not apply, it established that the "principles" of *Younger* do have a life independent of the holding of that case. In *Hicks v. Miranda*[205] it became evident how vigorous that life can be.

A. Hicks v. Miranda

Hicks v. Miranda, decided at the end of the 1974 Term, laid waste the century-old canon of federalism that the filing of an action in state court could not oust a federal court first obtaining jurisdiction of the case. In *Hicks*, Orange County, California, police seized four copies of the movie "Deep Throat" from a theatre on four separate warrants, and the county prosecutor filed a misdemeanor complaint against two theatre employees. The theatre owners, who were not defendants in the state criminal misdemeanor action, filed a federal suit seeking an injunction against enforcement of the California obscenity statute, a declaratory judgment of its unconstitutionality, and an order for the return of the four seized prints. Six weeks later, the county prosecutor amended his criminal misdemeanor complaint in municipal court to add the theatre owners as defendants. A three-judge federal court subsequently found the California obscenity statute unconstitutional and rejected the applicability of *Younger* on the grounds that criminal charges were not pending against the federal plaintiffs when the federal court acquired jurisdiction, and, alternatively, that the pattern of seriatim seizures constituted bad faith and harassment sufficient to support an exception if *Younger* applied.

On appeal, Justice White, writing for a sharply divided Court, reversed the district court's finding that *Younger* did not apply.[206] He stated the new rule in remarkably general language: "We now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place . . ., the principles of *Younger v. Harris* should apply in full force."[207] Bluntly, *Hicks* allows any state prosecutor to oust a federal

205. 422 U.S. 332 (1975).

206. The Court also discussed some aspects of three-judge court jurisdiction, and upbraided the district court for failing to give a summary disposition by the Court the full precedential weight due a decision on the merits. *See generally* Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of* Hicks v. Miranda, note 2 *supra*.

207. 422 U.S. at 349. Justice White noted that the theatre owners and employees were represented by the same counsel and found it obvious that their interests were intertwined. He

court from jurisdiction over a suit challenging a state statute simply by filing criminal charges against the federal plaintiff before the talismanic "proceedings of substance on the merits" occur in federal court. For the first time, federal jurisdiction may be destroyed by a state functionary even after it is properly assumed. This powerful tactical weapon is solely within the control of the state prosecutor.[208]

In order to establish this rule, the Court maintained that the case was of first impression. It was true, as Justice White declared, that "neither *Steffel v. Thompson* . . . nor any other case in this Court has held that for *Younger v. Harris* to apply, the state criminal proceedings must be pending on the day the federal case is filed."[209] But the statement, so far as it is relevant, is unedifying. The Court's failure to address the question in the brief interval between *Younger* and *Hicks* does not support the *Hicks* result. The Court had faced the question on many occasions prior to *Younger* and had come to a different conclusion. In *Ex parte Young*, for example, Justice Peckham declared emphatically that:

> When [a state] indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed.[210]

did not rely upon this kinship expressly, however, in forcing all of the defendants back into state court. *See* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), decided the following week, in which all defendants had "similar business activities and problems," as well as common counsel, but in which the Court believed it "Procrustean" to treat them all the same way for *Younger* purposes. *Id.* at 928.

208. It has been urged that the discretion the *Hicks* rule confers upon state prosecutors effectively to restrain federal proceedings can be limited by an expansive reading of "bad faith." *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 164-69 (1975). There is no reason to date for supposing that the "bad faith" exception will bear any reading at all, still less an expansive one. *See* note 259 *infra*.

209. 422 U.S. at 349. Justice White wrote that "at least some Justices have thought" the question was open. *Id.* n.17. He cited a footnote to the separate opinion of Justice Brennan in Perez v. Ledesma, 401 U.S. 82, 117 n. 9 (1971), in which the door had indeed been left open.

210. 209 U.S. 123, 161-62 (1908). *See also id.* at 160 & 166 for similar statements. As Justice Gray described English equity practice: "[A] court of chancery has no power to restrain criminal proceedings *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there . . . .*" *In re* Sawyer, 124 U.S. 200, 211 (1888) (emphasis in original). The Anti-Injunction Act as amended in 1948 reflects that policy in providing for stay of state proceedings by federal courts "where necessary in aid of its jurisdiction." 28 U.S.C. § 2283. At least three statutory exceptions to the Act, those for bankruptcy, interpleader, and removal, are derived from the same policy. What began as judicial policy, perhaps with French v. Hay, 89 U.S. (22 Wall.) 250 (1874), was confirmed by congressional policies. Neither receives mention in the *Hicks* opinion. *See also* Donovan v. City of Dallas, 377 U.S. 408, 412-13 (1964) (Black, J.).

That black-letter statement was unquestioned before *Younger*, and its venerable age alone should have warranted some discussion by Justice White. Instead, the absence of any decision for the four years preceding *Hicks* was held sufficient to leave the field clear.

So cavalier a disposition of a matter long thought settled was typical of the work of the Court in *Hicks*. Justice White, with no precedent to draw upon, justified his holding on the ground that it was necessary "unless we are to trivialize the principles of *Younger v. Harris*."[211] After *Huffman* and *Hicks, Younger* contains only one principle—comity.[212] In fact, the word equity did not appear in *Hicks*. Perhaps this explains Justice White's failure to consider the prior rule that a federal court had a duty to retain jurisdiction once acquired. That was a rule of equity; it disappeared from Our Federalism with equity itself.[213]

211. 422 U.S. at 350.

212. For the reduction of *Younger* to comity alone, Justice White cited the separate opinion of Chief Justice Burger, concurring and dissenting in Allee v. Medrano, 416 U.S. 802, 830 (1973). *See* note 259 *infra*. *But see* Ohio Bureau of Employment Servs. v. Hodory, 97 S. Ct. 1898, 1904 (1977) (Blackmun, J.), ("*Younger* and [*Huffman*, *Juidice* and *Trainor*] express equitable principles of comity and federalism"). At one time, a showing that a decision adverse to the federal plaintiff's cause binding the lower state courts and requiring an appeal through the state system until a court able to overrule the precedent was reached, established irreparable injury to the federal plaintiff. *See* Local Loan Co. v. Hunt, 292 U.S. 234 (1934). The Court dismissed a similar claim of futility raised by the theatre owners in *Hicks* on the grounds that "Younger v. Harris is not so easily avoided. State courts, *like other courts*, sometimes change their minds." 422 U.S. at 350 n.18 (emphasis added).

213. The second part of the *Hicks* holding starkly illustrates that equity, even in the vestigial form of the *Younger* opinion, has been washed out of the calculus entirely. The district court found that the multiple seizures by the police supported the theatre owners' allegations of bad faith and harassment and that the subsequent prosecution of the owners appeared to be " 'in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this court.' " 422 U.S. at 350 n.19. The Court reversed those findings summarily as "vague and conclusory." *Id.* at 350. To a considerable extent, the exception stated in *Younger* for prosecutions brought in bad faith to harass was rooted in equity's inquiry into the adequacy of state remedies. Each time the Court refuses to find the facts to support that exception or to accept a lower court's finding, another nail is driven into the coffin of equity as a component of Our Federalism.

There is considerable discrepancy between the close check the Court maintained over the district court in *Hicks* and the broad power that decision conferred upon state prosecutors to restrain federal proceedings by merely filing state charges. Four months earlier, in Gerstein v. Pugh, 420 U.S. 103 (1975), the Court held a pre-trial detainee entitled to a hearing on the issue of probable cause on the grounds that "a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate." *Id.* at 117. In *Hicks*, however, the Court appeared to have swung around to the belief that a prosecutor would be neutral and detached in determining whether to abort an attack on the constitutionality of a state statute by removing the federal plaintiff to state court as a defendant.

The Court seems deferential enough to trial court findings of fact as long as the trial court is not a federal one (and, perhaps, as long as the federal court does not find facts beyond the reach of Our Federalism). *Compare* Schlesinger v. Councilman, 420 U.S. 738 (1975), and Withrow v. Larkin, 421 U.S. 35 (1975), *with* Rizzo v. Goode, 423 U.S. 362 (1976), and Hicks v. Miranda, 422 U.S. 332 (1975). *Cf.* Meek v. Pittenger, 421 U.S. 349, 392 (1975) (Rehnquist, J., concurring

The bias of the comity of *Hicks* appears from the double standard of pendency for state and federal proceedings implied by in the decision. Although neither *Younger* nor *Huffman* focused on the initial point of pendency for state proceedings, *Hicks* established that the formal filing of state charges precludes federal intervention. The jurisdiction of a federal court over a claim for equitable relief under section 1983, however, does not attach securely until "proceedings of substance on the merits" take place. Until then, the federal court cannot protect its jurisdiction by restraining state proceedings, because it has none to protect.

B. The 1976 Term: Juidice, Maynard, *and* Trainor

Our Federalism threw off no bolts of lightning during the 1975 Term, but the 1976 Term was a different matter. In *Juidice v. Vail*,[214] *Wooley v. Maynard*,[215] and *Trainor v. Hernandez*[216] the Court worked along the lines laid out in *Huffman*, finding the requisite intensity of state interest in classes of cases in which it had not been obvious before and extending pendency back to the gleam in the process-server's eye.

1. Juidice v. Vail.—In *Juidice v. Vail*, eight default debtors challenged New York's statutory scheme for civil contempt as a denial of due process of law in federal district court. The New York statutes permit creditors' attorneys to issue subpoenas to default judgment debtors requiring disclosure of assets. On an attorney's motion, the county court issues a show cause order followed by an *ex parte* civil contempt citation against any judgment debtor who does not respond to the subpoena, and thereafter orders commitment of the debtor pending payment of a fine for the contempt, to the creditor.[217] The three-judge district court granted a partial summary judgment invalidating the statutes and restraining future enforcement. On appeal, the Supreme Court dropped one of *Huffman*'s other shoes,

and dissenting) (criticizing Court's tendency to disregard district court findings in establishment clause cases). The pattern may not hold, however, when a state trial court interprets the Constitution to require procedural protection for criminal defendants. *See* Oregon v. Haas, 420 U.S. 714, 726 (1975) (dissenting opinion of Marshall, J.).

In Town of Lockport v. Citizens for Community Action, 430 U.S. 259, 264 n.8 (1977), the Court appeared to limit a state's power to invoke *Hicks* in order to remove a case in federal court to criminal suits filed shortly after instigation of the § 1983 action.

214. 430 U.S. 327 (1977).

215. 430 U.S. 705 (1977).

216. 97 S. Ct. 1911 (1977).

217. N.Y. JUD. LAW §§ 756, 757, 770, 772-75 (McKinney 1975). The scheme is clearly adapted more to the efficient collection of debts than to scrupulous observance of nice points of due process, and has been regularly condemned by commentators on that ground. *See* note 218 *infra*.

and held that the *Younger* doctrine should be extended to cover civil contempt proceedings.[218]

Justice Rehnquist, writing for the Court, began with an object lesson in the restrictive uses of standing doctrine. Since six of the plaintiffs had served their time and paid their fines, the underlying default judgment was discharged, and they lacked standing to challenge statutory procedures. The remaining two plaintiffs alleged the imminence of commitment orders against them, one having failed to respond to a show cause order, the other already having been adjudged in contempt.[219] They were found to have standing on the ground that state proceedings were actually pending against them.[220] Given the significance of that term in the jurisprudence of the *Younger* doctrine, the point at which the proceedings became "pending" is crucial. Clearly, proceedings are pending by the time an order to show cause issues, but the Court refused to settle whether the original default judgment, to which all of the other statutory steps are ancillary, was itself a pending proceeding until discharged, or whether the creditor's subpoena was the crucial step, or whether the show cause order itself satisfied the litmus test.[221]

As the Court classified the plaintiffs, however, standing was inseparable from the pendency of state proceedings. Plaintiffs were thus caught in the passive vise of the *Younger* doctrine: they either lacked standing to raise the federal claim, or, given standing because of the pendency of state proceedings against them, became vulnerable to *Younger* "abstention" should the proceedings fall within the ambit of that doctrine.

On the central question, the Court held *Younger* applicable to "a case in which the State's contempt process is involved,"[222] regardless of the

218. The case was not an easy one, and the Court's treatment is murky in the extreme. Although the state statutory scheme was unedifying, *see* Alderman, *Imprisonment for Debt: Default Judgments, the Contempt Power & the Effectiveness of Notice Provisions in the State of New York*, 24 SYRACUSE L. REV. 1217 (1973); Comment, *Due Process Denied: Consumer Default Judgments in New York City*, 10 COLUM. J. L. & SOC. PROB. 370 (1974); *see generally* Brief for Appellees, at xvi-xviii, Juidice v. Vail, 430 U.S. 327 (1977), the appellee defendants had not exerted themselves to use the state processes. While the Court did not purport to reach the merits of the claims, there is no malignancy in suspecting that had appellees been penurious bishops arrayed in spotless white, Justice Rehnquist might have withheld some of his more menancing statements.

219. 430 U.S. at 332.

220. *Id.* at 332-33. Justice Rehnquist's failure either to honor or to reverse the lower court's certification of the appellees as a class under F.R. CIV. P. 23(b)(2) is inexplicable, in light of the Second Circuit's rule for such certifications. *See* Frost v. Weinberger, 375 F. Supp. 1312 (E.D.N.Y. 1974), *rev'd on other grounds*, 515 F.2d 57 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976). It could be grasped as a result of stingy application of standing criteria, if the entire case had been thrown out.

221. 430 U.S. at 332-33.

222. *Id.* at 335. It is impossible to infer from the decision whether the Court saw the

label—civil, quasi-criminal, or criminal—placed on the contempt proceedings. Citing only *Huffman*,[223] the immortal *Toucey*,[224] and, somewhat improbably, *Ex parte Young*,[225] Justice Rehnquist pointed out that the *Younger* doctrine was not confined to cases concerning the state criminal process, but applied whenever " 'the more vital consideration' "[226] of comity would be breached by federal intervention. Comity itself derives from the "proper respect for state function, . . . and . . . the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[227] Since the contempt process is the state's means of vindicating the regular operation of its judicial system, the principles of *Younger* and *Huffman* apply to secure it from federal intervention, despite the Court's concession that the state's interest is not "quite" so great as in its criminal laws, nor even in the quasi-criminal nuisance proceedings insulated in *Huffman*. *Younger* controlled even though the contempt power in *Juidice* was triggered by coercive proceedings between private parties, in which the state had little direct interest. In the Court's view, since the contempt process "lies at the core of a State's judicial system,"[228] federal interference would offend comity, and would reflect "negatively upon the state court's ability to enforce constitutional principles."[229] In *Younger*, Justice Black couched the decision in

proceedings as continuous from first notice of default through commitment for contempt. *See id.* at 333 n.9.

223. 420 U.S. 592 (1975). *See* Part III *supra*. The Court's decision to apply *Younger* probably reflects its views on the merits, which it purported not to reach. The justices in the *Vail* majority also constituted the majority in United States v. Kras, 409 U.S. 434 (1973), and Ortwein v. Schwab, 410 U.S. 656 (1973). They are not backward in rebuffing a class of debtors who often are jailed for debts they cannot understand, much less pay.

224. Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941). *See* note 149 *supra*. Justice Rehnquist makes it more explicit than did Justice Black in *Younger* that it is the reasons underlying the Anti-Injunction Act, not the statute itself, upon which he relies.

225. 208 U.S. 123 (1908). *Ex parte Young* is cited for dicta supporting federal equitable restraint when state proceedings are pending. The quotation from *Ex parte Young* cites Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 370 (1873), and Harkrader v. Wadley, 172 U.S. 148 (1898), cases generally perceived as undermined by *Ex parte Young*. *See* Taylor & Willis, *supra* note 49, at 1190-91, and Warren, *supra* note 48, at 371-75. As Professor Wechsler, *supra* note 2, at 753-55, points out, *Harkrader* was a direct precursor of Stefanelli v. Minard, 342 U.S. 117 (1951), and did not contain a challenge to the underlying state statute. *Taylor* did not involve federal litigation at all. Contrary to the implication of Justice Rehnquist's citation to *Young*, "[n]o general rule of federal law requires a federal court to abate or stay a proceeding otherwise within its jurisdiction merely on a plea of prior action pending in a state court. Stanton v. Embrey, 93 U.S. 548 (1877)." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 200, at 1234. *See also* Donovan v. City of Dallas, 377 U.S. 408, 413 (1964); Kline v. Burke Constr. Co., 260 U.S. 226 (1922).

226. 430 U.S. at 334 (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 601 (1975)).

227. *Id.* at 335 (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)). That formulation of comity says nothing about the well-being of the federal citizen or how an individual may be affected by the separate ways of the states.

228. *Id.*

229. *Id.* at 336.

terms of the freedom of states from federal interference, not the freedom of federal citizens from state oppression. Nevertheless, the equitable notion of "irreparable injury" still figured in his scheme and, theoretically, could override the concerns of comity. The private right asserted in *Juidice*, however, if one may speak of an interest in the due process of law as merely a private one, did not have a place in Justice Rehnquist's analysis of competing interests. He was unconcerned with the character of the appellees' asserted right and with the burden imposed upon them of vindicating it through state proceedings. Having placed state contempt proceedings presumptively beyond the reach of federal injunctive and declaratory relief, Justice Rehnquist attached a single condition admitting of neither balancing nor adjustment: "Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceeding. No more is required to invoke *Younger* abstention."[230] To hinge the applicability of the *Younger* doctrine on nothing more than the fact of an opportunity to present federal claims in state proceedings[231] was a dramatic step. Even Justice Frankfurter maintained that state remedies could not be considered in connection with the scope of federal equity jurisdiction without, in effect, repealing by judicial decision the statutory grant of jurisdiction contained in the 1875 Judiciary Act.[232] *Juidice* supports denial of equitable jurisdiction without any inquiry into the adequacy of the state remedy. Dissenting in *Juidice*, Justice Brennan observed that the Civil Rights Act forbade such abdication of federal power. He described the majority's decisions in *Huffman* and *Juidice* as a "plain refusal to enforce the congressional direction," which "for all practical purposes reduces *Mitchum v. Foster* to an empty shell."[233]

230. *Id.* at 337 (emphasis in original). The district court had supposed an actual hearing was required under state practice before *Younger* applied. Justice Rehnquist repudiated the notion, and perhaps the facts of the case, *i.e.*, appellees' disregard of each stage of the state proceedings, forclosed an opposite result. *Cf.* Trainor v. Hernandez, 97 S. Ct. 1911 (1977) (nature of opportunity to be heard left undefined). *See* text accompanying notes 282-85 *infra*.

231. In an alternative formulation Justice Rehnquist spoke of "an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings." 430 U.S. at 337. Whether there is a difference remains to be seen.

232. Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 352-53 (1951) (concurring opinion of Frankfurter, J.)

233. 430 U.S. at 345 (dissenting opinion of Brennan, J., joined by Marshall, J.). Justice Brennan also pointed out one potentially significant respect in which *Juidice*, a triumph of comity, might be injurious to the interests of the states. While a § 1983 suit in federal court "necessarily names the State or its officials as defendants, and the litigation focuses squarely on the validity of the statute," not all states will be able to intervene in private actions involving constitutional challenges to state statutes. Even those states that can intervene or, like New York, in some cases *must* intervene, will have to choose between intervening in all manner of private lawsuits or "risk[ing] adverse decisions having effects far beyond the interests of the particular private parties." *Id.* at 345-46.

By its lack of curiosity about state remedies, the Court seemed to suggest that any inquiry into the adequacy of state remedies would reflect negatively upon the competence of state courts and judges. After *Juidice*, then, the *politesse* of comity might not permit the inquiry to be made. Comity, the "public interest" in state autonomy developed by Stone to balance claims of property rights, thus stands alone. While equity *might* be revived as a balance against comity, *Juidice* contained no hint of the method of revivification.

Justice Stevens, concurring in the judgment, remarked upon an aspect of appellee's claim that the Court's opinion does not address. As he put it, "[t]he federal remedy that appellees seek is protection against being required to participate in an unconstitutional judicial proceeding. Even ultimate success in such a proceeding would not protect them from the harm they seek to avoid."[234] To Justice Stevens, a systemic challenge of that sort had to be considered on its merits. Considerations of comity alone were necessarily inadequate to dispose of it. Reaching the merits, he found that the New York statutory scheme met minimum constitutional standards.[235] His main analytical point, however, was lost on the Court. An attack on the constitutional adequacy of the pending state proceedings cannot be met by an irrebuttable presumption of adequacy or by the bland observation that judicial bad faith is neither alleged nor proven.[236]

234. *Id.* at 340-41.

235. *Id.* at 341. Justice Stevens asserted that there is no denial of an impecunious debtor's right to counsel under the New York statutes because "proof of indigency, which would necessarily precede any appointment of counsel, would also provide a defense to any contempt charge." *Id.* The basis for Justice Stevens' certainty that the standards of indigency are the same for both purposes does not appear from his opinion. He also does not consider that counsel may be necessary to inform both the debtor and the court of the defense. This circularity concerning the lawyer's role is indefensible in relation to consumers who frequently cannot understand the meaning or the consequences of the legal papers served upon them. They may have signed all of the wrong papers and failed to appear at all of the proper places long before they ever see an attorney. *See generally* Amicus Curiae Brief of New York State Consumer Protection Bd., Juidice v. Vail, 430 U.S. 327 (1977). The point is further strained when, for example, a debtor is illiterate, as was one of the named plaintiffs. Brief for Appellees, *supra* note 218, at 25 n. 30.

236. The problem of the systemic challenge Justice Stevens raises is not uncommon in the jurisprudence of the *Younger* doctrine. The booksellers and film distributors in Mitchum v. Foster, 407 U.S. 225 (1972); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Hicks v. Miranda, 422 U.S. 322 (1975); and Sendak v. Nihiser, 423 U.S. 976 (1976), faced a similar difficulty, complaining that the state statutes amounted to prior restraints. For all such federal plaintiffs, the presentation of their claims in state courts amounted to submission to the very process they wished to challenge. *See* Trainor v. Hernandez, 97 S. Ct. 1911 (1977). In *Mitchum*, the state court had held the film distributor in contempt, and state appellate review of an interlocutory order and of the contempt proceeding was pending at the time the federal suit was filed. Mitchum v. Foster, 315 F. Supp. 1387, 1388 (N.D. Fla. 1970), *rev'd*, 407 U.S. 225 (1972). The problem of the systemic challenge arose prior to *Younger* as well. *See, e.g.*, Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). Professor Bickel commented on the dilemma presented by *Times Film*: "There is and there ought to be no rule of constitutional standing that, in order

The introduction in *Huffman* of a requirement for exhaustion of state appellate remedies did not eliminate the distinction between pending and non-pending proceedings, but it expanded the notion of pendency toward the point at which the distinction is insignificant. After *Juidice*, the scope of pendency is entirely unclear. The difficulty stems from the Court's failure to state whether the "pending" proceedings were those relating to default or those ancillary to it, relating to citation and commitment for contempt.[237] If the former, pendency may commence at the point of the creditor's notice of default and motion for judgment, and since an "opportunity" to present federal claims exists, Justice Rehnquist's rule is satisfied.[238] This theory could make the applicability of the *Younger* doctrine turn on problems of notice. If the contempt proceedings were the relevant pending proceedings in *Juidice*, a federal suit to challenge the statutory scheme would have to be filed between service of the disclosure subpoena and the issuance of the contempt order in order to avoid the problems of standing and of triggering the *Younger* doctrine.

The greater potential extension of pendency suggested by *Juidice*, however, bears on the exhaustion of state remedies. Justice Rehnquist remarked that the most propitious moment for the appellees to have presented their federal claims was at the hearing on the order to show cause.[239]

to construct a justiciable case, a plaintiff must submit to the very burden whose validity he wishes to contest." A. BICKEL, *supra* note 150, at 135. He noted that in a film-licensing scheme "the very requirement constitutes the injury alleged." *Id. Cf.* Douglas v. City of Jeannette, 319 U.S. 157 (1943) (standing based upon first amendment rights abridged by criminal proceedings); *see* text accompanying notes 102-05 *supra*.

237. Appellee Vail appeared to provide an answer to the question. Although he had already paid his "fine" and had been released from jail, his fine did not discharge the full amount of his judgment debt. The judgment, therefore, was still outstanding against him, and he was liable to another round of subpoenas, show cause hearings, contempt orders, fines, and jailings at the creditor's behest. He was not embroiled at that time, however, in contempt-related proceedings, and he alleged imminent threat of further proceedings. The Court, which took up the standing question sua sponte, noted that the threat of further orders in the underlying debt action might have given him standing to contest the constitutionality of the contempt procedures. He had not alleged, however, "the likelihood, or even the possibility" of future contempt orders, and standing was not to be "based on such speculative conjectures which are neither alleged nor proven." 430 U.S. 333 n.9. That language suggests strongly that although the Court viewed the debt action as still pending, the "ancillary" contempt procedures were not. Whether the Court's ungenerous view of Vail's standing on the basis of "threatened" proceedings is a rule that will survive other cases, or is merely a device for shooting stragglers in this one, is unclear.

238. A number of the Court's prior decisions would go by the board, if the bare opportunity, without inquiry into the character of the opportunity or the "test" it affords, is meant as strictly as stated in *Juidice*. Ms. Fuentes, for one example, would be cooking with sterno. *See* Fuentes v. Shevin, 407 U.S. 67 (1972).

239. 430 U.S. 337 n.14. The disclosure subpoena process may require the judgment debtor to disclose all of his assets, and to furnish his tax returns and bank books to the creditor's attorney

He went on to note, however, that even after a contempt order has issued, New York procedures provide for a motion to vacate, and for application to stay or restrain the fine and commitment.[240] He did not mention the possible barrier to indigents, a group not improbably affected by the statute,[241] of filing costs and attorneys' fees; nor did he consider all the "opportunities" to present a federal claim that an ingenious attorney might devise.[242]

In sum, the Court's disposition of *Juidice* bears a family resemblance to the two great cases of the *Younger* doctrine, *Younger* and *Huffman*, in the broad resolution of its narrow issues, in the way it casts doubt on matters not required to be addressed and previously thought clear,[243] and in the

at the latter's office, with neither a requirement of counsel nor the supervision of a judge. That might itself be a "propitious" time to make a constitutional challenge to the procedures.

240. *Id.*

241. Five of the eight named plaintiffs in *Juidice* were receiving general welfare and were thus presumptively indigent. Amicus Curiae Brief of New York State Consumer Protection Bd., *supra* note 235, at 69 n.156.

242. For examples of attorney ingenuity, see J. BARTH, THE FLOATING OPERA (1956).

243. The Court reserved consideration of three problems relating to the extension of *Younger* to all civil litigation, to the scope of exceptions to the doctrine, and to damage actions under § 1983. Justifying the *Juidice* result, the Court insisted that the civil contempt proceedings serve an interest "by no means spent upon purely private concerns," but stand "in aid of the authority of the judicial system." 430 U.S. 336 n.12. *Cf.* Joiner v. City of Dallas, 380 F. Supp. 754, 759 (N.D. Tex.) (*Younger* requires dismissal only when a pending state proceeding forms a nexus with state criminal law enforcement), *summarily aff'd*, 419 U.S. 1042 (1974); *see* note 206 *supra*. Unless Justice Rehnquist intends to advance by means of a theory of state involvement and state action through the judicial process, *see* Shelley v. Kraemer, 334 U.S. 1 (1948), his assertion of a strong state interest in contempt proceedings is curious. For a summary of distinctions between civil and criminal contempt, see generally Soifer, *Parental Autonomy, Family Rights and the Illegitimate: A Constitutional Commentary*, 7 CONN. L. REV. 1, 25-29 (1974).

Addressing the possibility that the facts, allegations, and proofs in *Juidice* might support one of the grounds for an exception to *Younger*, Justice Rehnquist dismissed out of hand the notion that the statutes themselves could fall under the "flagrantly and patently unconstitutional" rubric held out by Justice Black in *Younger*. As to bad faith and harassment, however, he noted that some allegations concerning the creditors in *Juidice* were not inconsistent with such a charge. He went on to say that "[t]his exception may not be utilized unless it is alleged and proven that [the appellant justices] are enforcing the contempt procedures in bad faith or motivated by a desire to harass." *Id.* at 338. It has been supposed that bad faith or harassment in prosecution has referred to prosecutorial authorities, and by extension to the civil area, would refer to the creditor-appellants in *Juidice*. If, however, the desire to avoid reflecting negatively on the capacity of state judges to enforce constitutional rights is at the core of Our Comity, it would be perfectly logical to maintain that the bad faith of prosecutors, or of judgment creditors, can be made good in state proceedings by the bench. Chief Justice Burger took a step in that direction in his separate opinion in Allee v. Medrano, 416 U.S. 802, 838 (1974), in which he appeared to require proof of a conspiracy between police and prosecutors before an exception to *Younger* could be established. *See* note 259 *infra*. The Court came close to a similar position in Rizzo v. Goode, 423 U.S. 362, 371 (1976). Justice Rehnquist's opinion in *Juidice* suggests that the Court might require some showing that state judges themselves were parties to such a conspiracy, which would establish a prima facie case of breakdown in a state legal apparatus, before the bad faith exception to the *Younger* doctrine could be established.

The Court said that it intimated no opinion whether a § 1983 action for damages would fall under the *Younger* doctrine, 430 U.S. at 339 n.16, ominously citing Monroe v. Pape, 365 U.S. 167 (1961). Intimating no opinion in a footnote may be somewhat like the marks a woodsman leaves on trees to be felled his next time through.

potential of its language for future expansion.[244]

2. Wooley v. Maynard.—The bluntly systemic nature of *Juidice* made the Court's decision less than a month later in *Wooley v. Maynard*[245] seem bizarre in comparison.[246] George Maynard, a Jehovah's Witness, was arrested and convicted three times[247] for violating a New Hampshire statute that made it a misdemeanor to obscure the state motto, "Live Free or Die," embossed on passenger vehicle license plates.[248] He represented himself in the state court each time, and he did not appeal any of the convictions.[249]

244. The Court probably should have remanded the summary judgment granted prior to defendant's answer, as it had to have been based on the premise that no argument or factual showing *could* have supported the challenged statutes. Justice Stewart, dissenting, argued for *Pullman* abstention, 430 U.S. at 348, completing the set of possible views on the issue in *Juidice*. The majority held for dismissal based on one-sided comity; Justice Brennan argued for the integrity of statutory civil rights jurisdiction; all that was lacking was a *Pullman* argument, the mediating principle, acceptable to none. For suggestion of the propriety of *Pullman* abstention on the facts of *Juidice*, see Carey v. Sugar, 425 U.S. 73 (1976), in which the *Younger* arguments were briefed fully, and *Pullman* abstention was ordered for clarification of questions of New York law similar to those in *Juidice* but more complex, and about which there was notable disagreement.

245. 430 U.S. 705 (1977).

246. Wherever *Maynard* may stand in the development of the *Younger* doctrine, it is of a piece with the Court's prior decisions in the area, with technicalities assuming overriding importance, and with freshly printed decisions playing no role at all—*Juidice* was not even mentioned. It also reinforces the impression that the *Younger* doctrine serves as a kaleidoscope, through which the member of the Court who happens to be writing an opinion on a given day can find whatever pattern most pleases him.

The barriers to standing, so high in *Juidice*, were lowered nearly out of sight in *Maynard*. Ms. Maynard was also a Jehovah's Witness, and she was joint owner of the family automobile. The Court accepted that she was as vulnerable as her husband to prosecution. For purposes of declaratory relief, therefore, she was virtually indistinguishable from the petitioner in *Steffel*, who established imminence of prosecution by virtue of the fact that his companion had been arrested for exactly the conduct in which he proposed to engage. The threat to Ms. Maynard being accepted as genuine, she had standing without more. It is not so clear, however, why George Maynard himself was held to stand between the Scylla of criminal conduct and the Charybdis of forgoing what he believed to be a constitutionally protected activity. *See* 430 U.S. at 710 (quoting the classical trope of Justice Brennan in Steffel v. Thompson, 415 U.S. 452, 462 (1974)). Apparently because of his wife's standing and the uncomfortable position the Court conceded him to occupy, it was held that "under these circumstances he cannot be denied consideration of a federal remedy." 430 U.S. at 710. The holding seems to be a *non sequitur*, perhaps generated by fatalism. The Court knew it could not avoid the merits on Ms. Maynard's account, no matter what use it made of the exhaustion requirement *Huffman* appeared to impose on George Maynard.

247. He was fined $25.00, with execution suspended, for his first offense, and $50.00 plus a suspended six-month jail sentence for the second. When he refused to pay either fine as a matter of conscience, Maynard received and served a 15-day jail sentence. He meanwhile was charged with yet a third violation and again was found guilty. This conviction was "continued to sentence," so that it entailed no further penalty against Maynard; the district court found that, "[n]o collateral consequences will attach as a result of [the conviction continued to sentence] unless Mr. Maynard is arrested and prosecuted for the violation of NHRSA 262:27-c at sometime in the future." 406 F. Supp. 1381, 1384 (D.N.H. 1976).

248. N.H. REV. STAT. ANN. § 262:27-c (Supp. 1973).

249. In the state district court Mr. Maynard stated the religious basis for his refusal to comply with the statute. Under *Juidice* that would have constituted an "opportunity" to air his federal claims sufficient to bar subsequent suit in federal court, and he would have had further opportunities to present his claim on appeal. But both the district court and the Chief Justice

Several months after his release from a fifteen-day sentence for refusal to pay the fines assessed for his first two convictions, Maynard and his wife brought a section 1983 action for injunctive and declaratory relief, alleging the unconstitutionality of the statute on the grounds that it required an affirmation of belief and that the obscuring of the motto was protected symbolic speech. The three-judge district court resolved all preliminary questions, including the applicability of the *Younger* doctrine, in the Maynards' favor and granted both declaratory and injunctive relief.[250] On appeal, the Supreme Court, in an opinion by Chief Justice Burger, affirmed the judgment below.[251]

The Court determined that *Huffman* was limited to federal suits "designed to annul the results of a state trial."[252] Maynard had served his sentence, and he did not seek to have his record expunged or any collateral effects of his convictions in state court annulled. The Chief Justice construed the relief sought by the Maynards as wholly prospective,[253] dismissing the applicability of *Younger* or *Huffman*.[254] The Chief Justice's emphasis upon the prospective nature of the requested relief and the absence of any "design" to annul the results of a state proceeding poses some analytical problems. Determination of the "designed" purpose of a suit would be enormously difficult in many cases, and if the Court is inviting district judges to engage in motivational analysis, it does not suggest the appropriate method. The complexities of distinguishing *wholly* prospective relief from all other kinds of relief in a system of dual sovereigns are substantial. The

found *Younger* and *Huffman* inapplicable. The lower court also determined that the state criminal convictions did not preclude a federal civil rights action, under a First Circuit rule precluding federal suit "only with respect to matters actually litigated and decided at the state criminal trial." 406 F. Supp. at 1385 n.6. The lower court noted that, appearing *pro se*, Maynard "explained that he had religious objections to displaying the motto on his license plate." *Id.* at 1384. Perhaps because of the complications of assuming waiver by a defendant appearing *pro se*, or perhaps because of the complexity of the issue, the Court avoided overruling the lower court on either point. Maynard's self-representation may have formed the Court's judgment on the question of his waiver of available state court opportunities.

250. Judge Coffin's opinion for the three-judge court enjoined defendants from arresting or prosecuting the Maynards for covering over the state motto on their license plates, but declined to order the state officials to issue plates without the slogan. This forebearance exhibited the lower court's sensitivity to federal court interference with state processes. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

251. Chief Justice Burger was joined by Justices Brennan, Stewart, Marshall, Powell, and Stevens. Justice White dissented from the grant of injunctive relief in an opinion joined by Justices Rehnquist and Blackmun. Justices Rehnquist and Blackmun dissented on the merits as well.

252. 430 U.S. at 711.

253. *Id.*

254. The Chief Justice characterized the principles of *Younger* as "judicial economy, as well as proper state-federal relations." *Id.* at 710. After *Doran* and *Hicks*, the notion of judicial economy has an air of quaintness.

theatre owners in *Hicks*, for instance, had not been charged by state authorities when they filed their federal suit. It appeared that the relief they requested was "wholly" prospective, but *Younger* was held to apply.[255]

Although *Younger* did not apply in *Maynard*, the Court declared that "the concerns for federalism which lie at the heart of *Younger*"[256] determined the operative criteria of equitable restraint. With that obeisance, the Chief Justice went on to acknowledge that in exceptional circumstances injunctive relief might be appropriate.[257] The "threat of repeated prosecutions in the future," together with "the effect of such a continuing threat on [the Maynards'] ability to perform the ordinary tasks of daily life which require an automobile"[258] satisfied the requirement, justifying injunctive relief.[259] The Maynards' first amendment claims in religion and symbolic

255. Similarly, in O'Shea v. Littleton, 414 U.S. 488 (1974), the Court applied *Younger* against federal plaintiffs attacking bail and sentencing practices of officials of Cairo, Illinois. The lower court had found *Younger* inapplicable because "plaintiffs have not sought to enjoin the state from prosecuting anyone, but merely to enjoin the judges from unconstitutionally fixing bails and sentences." Littleton v. Burbling, 468 F.2d 389, 408 (E.D. Ill. 1972), *rev'd sub nom.* O'Shea v. Littleton, 414 U.S. 488 (1974). Justice White's opinion for the Court reached the *Younger* issue with some enthusiasm, since it had already disposed of the case because of the absence of a "case or controversy." *See also* Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975).

256. 430 U.S. at 712 (quoting Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975)).

257. Chief Justice Burger did not respond to the point made by Justice White, dissenting in part with Justices Blackmun and Rehnquist, that a declaratory judgment should have been sufficient absent subsequent unusual circumstances. Justice White did not mention that an opinion he wrote in 1975 appeared to hold that a plaintiff should be granted a preliminary injunction before consideration of a declaratory judgment remedy, if such an injunction could provide sufficient protection. Withrow v. Larkin, 421 U.S. 35, 43 (1975)(relying upon Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 (1940)).

258. 430 U.S. at 712.

259. The majority relied heavily on Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935), as a source for criteria applicable to the exercise of equity jurisdiction. Whether the *Spielman* Court purported to address a pending prosecution or a threatened one is unclear, but the doubt does not seem to have bothered the Justices of the *Younger* era. In any event, the Court addressed the special circumstances of *Spielman*, not the grounds for exception to *Younger*. It would be quite remarkable had the Court held *Younger* applicable to *Maynard*, but gone on to find that the facts of the case warranted an exception to the *Younger* doctrine. The only case in which the Court has found the classical irreparable injury of equity in a form sufficiently glaring to permit making an exception to Our Federalism was Gibson v. Berryhill, 411 U.S. 564 (1973), *see* note 138 *supra*.

As equity has disappeared from the calculus of Our Federalism, leaving only the systemic problems of comity to be considered, it has become clear that the grounds for exception to *Younger* amount only to different ways of showing that the state legal apparatus has broken down so thoroughly that federal rights cannot be vindicated through it in timely fashion. The cases have turned primarily on the adequacy of a plaintiff's demonstration of that breakdown under the rubric of bad faith, harassing prosecutions. *See* Withrow v. Larkin, 421 U.S. 35 (1975); Kugler v. Helfant, 421 U.S. 117 (1975).

A developing standard for determining the requisite pattern of violative conduct may be observed in several recent cases. The standard first became discernible in the separate opinion of Chief Justice Burger in Allee v. Medrano, 416 U.S. 802 (1974). In *Allee* the district court had enjoined Texas police officials from performing their duties in an unconstitutional manner. The Supreme Court remanded for a determination of whether the district court intended its order as a restraint upon any pending prosecutions under superseded state statutes, and, if so, whether

speech were not identified specifically as the exceptional circumstances. That the chilling effect of threatened state prosecutions upon the use of an

Younger was satisfied. In his separate opinion the Chief Justice refused to find that a pattern of grotesque intimidation of farm workers by Texas Rangers and Sheriff's deputies established a violation of petitioners' civil rights at all, much less the "bad faith" that would support a mandatory injunction directing those officers to refrain from unconstitutional acts. To determine the extent of misconduct, the Chief Justice toted up the number of proven incidents and divided that number by the number of days during which they had occurred. He found that misconduct had occurred on an average of only once per month over a one-year period, *id.* at 845, and concluded that "[t]he acts of police misconduct were few and scattered." *Id.* at 860. Given his premise, that "[w]illful, random acts of brutality by police, although abhorrent in themselves, and subject to civil remedies, will not form a basis for a finding of bad faith," *id.* at 838, and given his method of determining the requisite pattern, Chief Justice Burger probably could never be satisfied that the criteria for the bad faith exception to *Younger* were met.

Allee, like *Gibson*, was decided before the *Younger* doctrine coalesced in the 1974 Term. In that Term, the Court dismissed a district court's finding of bad faith and harassment as "vague and conclusory." Hicks v. Miranda, 422 U.S. 332, 350 (1975). The Court's reluctance to accept findings of fact that would support an exception to *Younger* was clear, but the majority had not developed a technique for rejecting them without the appearance of arbitrariness. The numbers game played by the Chief Justice in *Allee* was a promising possibility, however, and the Court may have employed it in Rizzo v. Goode, 423 U.S. 362 (1976), a case not overtly involving *Younger*, but in which the Court invoked the principles underlying the doctrine.

In *Rizzo* the Court rejected a lower court's finding that twenty incidents of unconstitutional conduct by Philadelphia police constituted a sufficient pattern to prove that elected officials were involved in a deliberate plan to deprive plaintiffs of protected rights. Distinguishing *Allee*, Justice Rehnquist found that the focus of that case was not simply the number of violations but some "common thread"—"a 'pervasive pattern of intimidation' flowing from a deliberate plan by the *named* defendants to crush the nascent labor organization." 423 U.S. at 375. The Court also rejected the statistical findings of the lower court since there was no showing that the police behavior differed in "kind or degree" from that occurring in other major urban areas. *Id.* After *Rizzo*, it appears that a civil rights claimant must not only show uncommon statistics involving violations, but also some common thread linking the named defendants to the violations. Although the discussion in *Rizzo* dealt with problems of showing statutory liability under § 1983, the Court's use of the *Allee* inquiry into irreparable injury indicates that the *Rizzo* test may be applicable to *Younger*. If so, the bad faith exception, if it was ever viable, is a dead letter. The test of bad faith, like a balloon, is almost infinitely distensible and without solid content. The influence of Our Federalism and the Court's inclination to afford to law enforcement officials greater discretion in their duties than to federal district judges as finders of facts, combine to make it improbable that the formula as applied by the present Court will ever yield a sufficient showing of bad faith.

The other main exception to *Younger* offered by Justice Black, the "flagrantly and patently unconstitutional" statute, was unpromising when articulated, but attempts have been made to use it. Sendak v. Nihiser, 423 U.S. 976 (1975), *vacating and remanding*, 405 F. Supp. 482 (N.D. Ind. 1974), concerned a movie theatre owner prosecuted under an Indiana nuisance statute for showing "Deep Throat." He sued one week later for federal declaratory and injunctive relief, alleging the patent unconstitutionality of the statute. The district court was scrupulous to a fault in balancing the interests of comity against the theatre owner's claims, and prescient in anticipating the Supreme Court's extension of the *Younger* doctrine. The suit was brought before Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), but the district court correctly anticipated that decision's extension of *Younger* to nuisance-obscenity proceedings:

> [A]ttempts to enforce civil provisions such as the one here may be characterized as civil proceedings utilized to enforce the criminal laws and thus subject to *Younger* in any event . . . . The best approach is not to regard labels "civil" and "criminal" as controlling, but to analyze the competing interests which each case presents.

405 F. Supp. at 493. The statute permitted "general reputation" of a business establishment to be received as prima facie evidence of nuisance. The censor did not carry the burden of proving that seized materials were obscene, and the statute provided for destruction of such materials without a hearing on the issue of obscenity. Further, the statute contained a definition of obscenity used in two other criminal statutes already voided by the Indiana Supreme Court as

automobile was sufficient is hardly believable, but that seems to be the basis for the Court's result.

In some respects, *Maynard* tracks *Ellis v. Dyson*.[260] In *Ellis* the Court applied *Steffel v. Thompson*,[261] rather than *Younger*, to state defendants who had pleaded nolo contendere, paid their fines, and elected to forgo trial de novo on appeal, in which they would have faced potentially more severe criminal sanctions. Dissenting in part, Justice White contended that *Huffman* barred consideration of the petitioners' request for expunction of their criminal records,[262] and the *Maynard* court appears to have adopted his position as the operative distinction. Dissenting, Justice Powell, joined by Justice Stewart, wrote in *Ellis* of his doubts about the propriety of using section 1983 to attack state court convictions collaterally when defendant either pleaded guilty or failed to pursue appellate remedies. He argued that federal habeas corpus standards should govern.[263] When the federal claim asserted in a section 1983 action does not involve the restraint upon personal liberty typical of habeas suits, as it would not in the run of civil cases, Justice Powell's restrictive view could well be adopted by the Court without doing violence to its holding in *Maynard*.[264]

Whether the Court intended any of those implications in *Maynard*, or is likely to pursue them further, remains unclear. It is only certain that on the facts of *Maynard*, a majority of the Justices willingly reverted to an equitable balancing approach that is extraordinary under Our Federalism and generous even under earlier standards of equity practice. The opinion does not reveal whether the *Maynard* test was good for that day only, whether it was good for those facts only, or even which of those facts were dispositive. The element of religion, imparting an odor of sanctity the appellees in *Juidice* could not claim, may have been important to the result, but it did not figure in the reasoning. Although the Court struck a balance, the elements

too vague to pass muster under Miller v. California, 413 U.S. 15 (1973). The three-judge court found the statute "flagrantly and patently in violation of express constitutional guarantees." 405 F. Supp. at 496. On appeal, the Supreme Court vacated and remanded for reconsideration in light of *Huffman*, "[f]or some unknown or at least unexplained reason." 423 U.S. at 976 (Brennan, J., dissenting). Statutes or ordinances as constitutionally rotten as that challenged in *Sendak* are rare, as are district courts with the clairvoyance to stay ahead of the Supreme Court in this field. The lower court complied with all the Supreme Court had said was required, but not, apparently, with what the Supreme Court had meant.

Trainor v. Hernandez, 97 S. Ct. 1911 (1977), has effectively completed the destruction of the unconstitutionality exception to *Younger*. *See* text accompanying notes 279-81 *infra*.

260. 421 U.S. 426 (1975).

261. 415 U.S. 452 (1974). *See* note 138 *supra*.

262. 421 U.S. at 437.

263. *Id.* at 442-43.

264. The Court also has been sedulously restricting the scope of federal habeas corpus. *See, e.g.*, Wainwright v. Sykes, 97 S. Ct. 2497 (1977); Stone v. Powell, 428 U.S, 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976).

balanced remain decidedly opaque. The disparate orbits of the various Justices may have brought them into a momentary conjunction, not soon to be repeated. *Maynard* may be doctrine; it may just as easily be sport. Although the *Younger* doctrine did not apply, its hydraulic power is apparent throughout the case.

3. Trainor v. Hernandez.—Anyone who might have thought after *Maynard* that the Court was returning to equitable balancing as a general policy was quickly disabused of that notion by *Trainor v. Hernandez.*[265] In *Trainor* the Illinois Department of Public Assistance claimed that Juan Hernandez and his wife had fraudulently obtained welfare benefits by concealing assets of personal property. Rather than filing criminal charges, the state filed a civil action to recover the monies allegedly obtained by fraud, and simultaneously initiated a writ of attachment under the Illinois Attachment Act[266] against defendants' savings in a credit union.

Hernandez was served with the civil complaint, the writ, and the statutory affidavit several days after his assets had been frozen on execution of the writ. He appeared in state court on the return date, ten days following service, but a hearing on the validity of the attachment was continued for an additional thirty days. In the interim, he filed a section 1983 action in federal court for declaratory and injunctive relief against enforcement of the Act, on the grounds that he and others similarly situated were denied due process for want of timely notice of attachment or of a timely hearing on its validity. A three-judge district court found that the *Younger* doctrine did not bar consideration of the merits for two reasons.[267] First, unlike the public nuisance proceedings in *Huffman*, the Illinois attachment procedures were available for use by any creditor. That the State in this case happended to be the creditor was held immaterial. Second, even if *Huffman* were controlling, the district court found the operative sections of the challenged statute patently violative of the due process clause of the fourteenth amendment, and hence within an exception to the *Younger* doctrine. Reaching the merits, the district court dissolved the attachment.

265. 97 S. Ct. 1911 (1977).

266. ILL. ANN. STAT. ch. 11, §§ 1, 2, 2a, 6, 8, 10, 14 (Smith-Hurd 1963 & Supp. 1977). The Act provided for the issuance of writs as of course by the clerk on the filing of an affidavit by the creditor containing the requisite allegations. Clerks maintained printed forms of affidavits containing blanks to be filled in according to the statutory categories of conclusory allegations. No facts were required in support of the allegations, nor did the forms contain space for any material in support of the allegations. Once the form was completed properly, the clerk had no discretion to refuse the writ. Additionally, the affiant could set the return date on the writ, neither less than 10 nor more than 60 days following execution. *See* Trainor v. Hernandez, 97 S. Ct. 1911, 1926 (1977) (Brennan, J., dissenting).

267. Hernandez v. Danaher, 405 F. Supp. 757, 760 (N.D. Ill. 1975).

On appeal, the Supreme Court held that *Huffman* did control the case, and that the lower court should therefore have dismissed it. Confronted with the threshold prerequisite to the applicability of the *Younger* doctrine, Justice White, writing for the majority, discerned a pending state proceeding in the attachment process. Hernandez had contended that issuance of the writ did not commence any proceeding, and that the only pending proceeding was the state's civil action for recovery of benefits paid, which could proceed unimpaired by any federal order directed at the ancillary attachment. Justice White disposed of the contention in a footnote, asserting that the writ issued from a court clerk and was "very much a part of the underlying action for fraud."[268] Further, since the writ carried a return date "on which the parties were to appear in *court* and at which time the appellees would have had an opportunity to contest the validity of the attachment,"[269] the attachment proceeding was in fact pending for *Younger* purposes. The facts that the writ was issued by a clerk, and showed a return date, were sufficient to distinguish this case from the situations presented in *Lynch v. Household Finance Corp.*,[270] *Fuentes v. Shevin*,[271] and *Gerstein v. Pugh*,[272] the very decisions held by the lower court to establish the facial invalidity of the Illinois Attachment Act. The Court distinguished, but did not differentiate, those cases. Indeed they were not discussed further. The impression created in *Huffman* and reinforced in *Juidice* that none of them remains good law is thus confirmed by *Trainor*. The Court also committed itself to the standard for "pending" and "proceeding" that had only been implied in *Juidice*, that of any act by an officer or employee of a court ancillary to suit. On the facts of *Trainor*, a state proceeding was arguably pending on issuance of the writ. In effect, unless the character of the action removed it from the ambit of *Younger* and *Huffman*, or it fell within one of the exceptions, the federal courthouse door had closed upon the state defendant before he knew he wished to enter it.

In this case, the character of the action did not foreclose application of *Younger* and *Huffman*. Because Illinois was a party to the suit "in its role of administering its public assistance programs. . . . [b]oth the suit and the accompanying writ of garnishment were brought to vindicate important state policies such as safeguarding the fiscal integrity of those programs."[273] That crucial state interest, together with the fact that the state could have pro-

268. 97 S. Ct. 1911, 1919 n. 9 (1977).
269. *Id.*(emphasis in original).
270. 405 U.S. 538 (1972).
271. 407 U.S. 67 (1972).
272. 420 U.S. 103 (1975).
273. 97 S. Ct. at 1918.

ceeded by way of criminal prosecution, was sufficient to bring the case within *Huffman* and *Juidice*. Although the state's interest may not have been as great in this "civil enforcement action"[274] as in its criminal statutes, or quasi-criminal nuisance proceedings, or even in the vindication of the dignity of its courts, the principles of *Younger* and *Huffman* were broad enough to include the *Trainor* circumstances.

The Court's explanation of the functional need for the protection of comity in this case, while not astonishing in light of prior decisions, is nonetheless illuminating. According to Justice White, if the federal case were to go forward, the State would have to choose between duplicative litigation, with the peril of a temporary injunction, and "interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future."[275] Also the state court would lose the opportunity to construe the state statute *as applied* in light of federal constitutional challenges; a suit brought by the State in its sovereign capacity would be disrupted; and a federal injunction would reflect negatively "on the State's ability to adjudicate federal claims."[276] The Court's list contains some familiar items, most notably the dim view of attacks on the facial validity of state statutes, and the pronounced aversion to negative reflections on the capacity of state judges to determine federal constitutional questions. The emphasis on the presence as a party of the State as a sovereign, evoking *National League of Cities v. Usery*,[277] permeates the decision. That element, coupled with Justice Blackmun's concurring opinion underscoring it, suggests that *Trainor* may represent the furthest extension of *Younger* into civil proceedings.[278]

The most interesting justification for invoking Our Federalism is that not only is the state a party, but it is trying to recapture money. As a matter of logic, any federal action, either in parallel with state proceedings or in arrest of them, might require the State to wait longer for its money, or at least for a determination of its claim. Under traditional equity principles, the possibility of delay or uncertainty in securing a determination of asserted federal rights would have been a basis for relief. In *Trainor*, however,

274. *Id.*
275. *Id.* at 1919.
276. *Id.*
277. 426 U.S. 833 (1976).
278. *See* 97 S. Ct. at 1920-21 (Blackmun, J., concurring); text at note 287 *infra*. The Chief Justice, however, appears interested in applying principles of *Younger* to state administrative proceedings. *See* Moore v. City of East Cleveland, 97 S. Ct. 1932, 1947-48, 1952 (1977) (Burger, C.J., dissenting). *Cf.* Rizzo v. Goode, 423 U.S. 362, 380 (1976) (Rehnquist, J.) (*Younger* principles applicable to suit concerning internal affairs of municipal police force).

"comity" turned out to entitle the State to federal equitable "restraint" so that it will not be unduly delayed in collecting its money.

All of those considerations, however, could be overcome if the statutory procedures invoked by the State did come within the "flagrantly and patently" unconstitutional exception to the doctrine. It appeared that the district court had so held, using the Court's prior attachment and garnishment cases as its yardstick. As the *Hicks* Court dismissed the lower tribunal's findings of bad faith and harassment there as "vague and conclusory,"[279] the *Trainor* Court simply refused to read the district court's language as a determination of an exception to *Younger*. Justice White quoted Justice Black's original phrase, which had been illustrative, not definitive,[280] and apparently inferred from the district court's failure to repeat the language *verbatim* that it had not found an exception.[281]

Evidently the Court preferred to ignore the district court's language rather than to acknowledge it as a holding and reverse. In any event, even had the lower court realized the importance to Our Federalism of liturgical exactitude, the Court would not have accepted the result. *Trainor* extinguished any thought that may still have lingered that any of the exceptions to *Younger*, if theoretically viable, would ever be found and sustained.

Hernandez might still have held onto his judgment below had the Supreme Court been satisfied that state procedures did not afford him adequate opportunity to present his federal claim in state court and have it timely decided there. The notion of bare opportunity was both the most severe and most interesting aspect of *Juidice*, and the Court returned to it in *Trainor*. Concluding that the point was not the basis of the district court's holding, whether or not it had been raised below, the Court refused to deal with the question.[282] The Court did not offer any express guidance for assessing the adequacy of the state remedy. Instead, it offered conflicting hints of the criteria it will insist upon with respect to the opportunity to raise

279. *See* note 213 *supra*.

280. 97 S. Ct. at 1928 (Stevens, J., dissenting).

281. *Id.* at 1920.

282. The Court's instructions were not explicit, but it appears to have remanded this issue for the lower court's consideration. *See* 97 S. Ct. at 1930 (Stevens, J., dissenting).

As in *Juidice*, the majority failed to address Justice Stevens' point, repeated in *Trainor*, that where it is the very procedures that the federal plaintiffs challenge, remittance to those procedures for adjudication is improper. If the issue was not presented below (since its importance was not clear until *Juidice*, it well may not have been), the Court was technically correct in not resolving it. Justice Stevens, however, would have placed the burden of demonstrating the adequacy of state procedures on the party resisting federal intervention. 97 S. Ct. at 1931 n.15 (Stevens, J., dissenting). That small adjustment would make a substantial difference in *Younger*-related litigation, and the majority evidently did not accept the suggestion.

Interestingly, all the Illinois judges who considered the case—the three judges below and Justice Stevens—seem to have agreed that the Illinois procedures were fatally defective.

a federal claim in state court. Justice White mentioned at the beginning of his opinion that Hernandez had not moved to quash the writ, a point that echoes *Juidice*. A welfare debtor, like the indigent illiterate in *Juidice*, is as likely to respond to the unexpected and perhaps incomprehensible delivery of a legal document with a motion to quash as he is to repair his want of bread with cake.[283] Justice White asserted, however, that dismissal under *Younger* required " 'fair and sufficient opportunity for vindication of federal constitutional rights.' "[284] There is no way of knowing whether that language represents a cynical abstraction, or a genuine, functional opportunity until a lower court finds that a particular state procedure is defective, and forces the question back upon the Court in concrete form. Possibly, *Trainor*, on remand, will become that case, but it would be premature to conclude from any of the language in *Trainor* that the Court has retreated from or modified the "bare opportunity to be heard" standard of *Juidice*.[285]

The possibility of retreat would not even be worth mentioning, considering the consistency of the majority opinion in *Trainor* with the decisions in *Huffman, Hicks* and *Juidice*, if the positions of the various Justices in *Trainor* did not suggest that Our Federalism may, for a time, have reached a limit. Justice Blackmun, ordinarily solicitous of state autonomy,[286] joined the majority's opinion but added a concurrence in which he placed great emphasis upon the importance not only of the State as a party, but also of the fact that the State could have proceeded against Hernandez criminally and, had it done so, *Younger* would clearly have applied.[287] If Justice Blackmun's views can be taken at face value, he would join the four dissenters in *Trainor* and refuse to extend *Younger* and *Huffman* to civil cases to which the State is not a party, and possibly even to those cases in which the State is a party, if the litigation is not related in some attenuated fashion to criminal law.

More important, however, is the emergence of Justice Stevens as the articulate opponent of the *Huffman* variations on the *Younger* doctrine.

283. Justice Stevens observed that even if a motion to quash were made, its denial by an Illinois judge would be interlocutory and therefore non-appealable. It would become appealable only after a final order in the underlying civil action and would, at that time, become moot. *Id.* at 1930.

284. *Id.* at 1917 (quoting Kugler v. Helfant, 421 U.S. 117, 124 (1975)).

285. The majority regarded the matter of the opportunity to raise and have one's federal claim heard in state court as a complicated question of local law. That is the classic situation for *Pullman* abstention. Justice Stewart, who contended for *Pullman* abstention in *Juidice*, dissented in *Trainor*, aligning himself with Justice Brennan and apparently giving up any expectation of mediating the split among the Justices. *Id.* at 1920.

286. *But see* Justice Blackmun's opinion in Rizzo v. Goode, 423 U.S. 362, 381 (1976)(dissenting opinion).

287. 97 S. Ct. at 1920-21 (Blackmun, J., concurring).

From his detailed dissenting opinion in *Trainor*, he apparently grasps fully the basis, character, and thrust of Our Federalism, and refuses to follow it when equity is subsumed totally into comity. For example, Justice White used *Great Lakes Co.* v. *Huffman*[288] to establish that federal equitable relief is contingent upon the inadequacy of state remedies at law. Justice Stevens countered with the observation that in tax cases—such as *Great Lakes*—in which the state's interest has received statutory protection from federal equitable interference, the statute also commands federal courts to inquire into the adequacy of state procedures. In *Trainor*, however, in which the State's interest was less substantial than in a tax case, the Court set up the adequacy of state remedies as crucial, but refused to inquire into the adequacy of the remedies challenged in that case. As Justice Stevens concluded, "[t]he Court is now fashioning a nonstatutory abstention doctrine which requires even greater deference to the State as an ordinary litigant than Congress regarded as appropriate for the State's more basic fiscal needs."[289] No clearer statement of the judicial aggrandizement inherent in *Younger* and *Huffman* can be found in the other opinions in *Trainor*. Justice Stevens adds a vote to the dissenting position and, if his *Trainor* opinion is a fair portent, may force the Court toward more candid and explicit statements of its actions and perhaps even toward justification.

V. Conclusion

Before the 1974 Term, it was still barely plausible to declare that "in first amendment cases *Younger* should be discarded. The sooner the better."[290] Such a statement now would be tantamount to complaining about gravity or the second law of thermodynamics. By the end of the 1974 Term, the Court had gone so far in attempting to pump the principles of *Younger* into every cranny of the dual-court structure that, however unfortunate the policy or inept its implementation, the process was more likely to continue than to abate. The Court has gone still further since—too far to pull back without having to be candid and conscious, not only of what it has done, but of what it would then be doing. It has not been able to declare itself openly as it has advanced, and no issue relating to *Younger* has been joined to date with the requisite equipoise of votes that would require or even enable it to do so in retreat.

288. 319 U.S. 293 (1943). *See* notes 91-96 & accompanying text *supra*.

289. 97 S. Ct. at 1930 (Stevens, J., dissenting). Justice Brennan, who has been equally clear and often more pungent in his opposition to the spread of comity, may be less effective than Justice Stevens because of his long tenure on the Court and the regularity with which he has registered his disagreements.

290. Wechsler, *supra* note 2, at 906.

An air of the surreptitious attached to Our Federalism at its inception in *Younger v. Harris*, and it clings to the doctrine as extended beyond issues ordinarily regarded as relating to equity or to federal courts. The Court couched the decision in language so ponderous as to signal a cataclysmic shift in doctrine, yet the holding was as narrow as possible without aligning with Justice Douglas in dissent. The extreme caution and delicacy with which Stewart, White, and Marshall disassociated themselves from Justice Black's language, together with Brennan's establishment of a defensive perimeter in *Perez v. Ledesma*[291] suggest that a protracted and divisive debate among the Justices preceded the final decision of the six cases. Apparently, the majority could not be shaken in their determination to crimp federal equitable relief as developed after *Dombrowski* and to put a sharp curb on free-wheeling doctrines developed during the civil rights era. Justice Black had, however, very scanty material from which to construct his case. The care with which he structured the decision indicates the intensity of the majority's commitment. The result was so vague in its origins and so lofty in its terms that it has served to advance a number of different agendas.

It is difficult, with so little aid from the Court, to suggest a coherent account of the policy implemented by the *Younger* doctrine. There may be some explanatory power, however, in taking the measure of what the Court has done as a mark of its intended purpose. The most extensive ramification of the Court's decisions stems from the exhaustion requirement of *Huffman*. The severe language in *Huffman* about annulment of state court judgments, consistent with the systemic focus of *Younger's* rhetoric, aligns with the Court's emphasis in *Juidice* and *Trainor* on the bare opportunity to present a federal claim in state proceedings. *Maynard*, however, is a more interesting problem. In *Huffman*, the state court judgment had continuing effect for a year. In *Maynard*, a federal order would not effect an existing state judgment. If the Court's heavy underscoring of the prospective character of the relief sought in *Maynard* is taken at face value, a rationalizing principle emerges: the Court is moving toward, or may have reached, a very hard, practical doctrine of exhaustion. Federal relief will not be available to anyone who may still be able to do something—or who omitted steps that might have been taken—under state processes. In *Huffman*, an expedited appeal might have been sought; in *Juidice*, a motion to quash the subpoena

291. Justice Brennan, joined in a concurring and dissenting opinion by Justices White and Marshall, asserted that "whether a particular case is appropriate for federal intervention depends on whether a state proceeding is pending and on the ground asserted for intervention." 401 U.S. at 120. Under Brennan's analysis, if plaintiffs asserted bad faith, then intervention was appropriate even if a state proceeding were pending, but a pending state proceeding foreclosed a challenge in federal court to the constitutionality of a statute on its face. *Id.*

might have been made. Mr. Maynard, however, had taken his medicine three times and faced credible prospects of further doses. There was absolutely nothing further he could do in state proceedings, except submit once more to arrest. The grant of federal relief would not even necessitate notice to the clerk of a state court.[292]

Under this exhaustion criterion, discretionary review by the Supreme Court on appeal would be in fact the only practical opportunity for federal review of a claim of federal right, though the Court occasionally may reach down for the exemplary case of state abuse. Since it is not likely that many such cases will occur, however, the federal courts will become an ultimate resort in the unusual case in which there has been obvious abuse, systemic breakdown, or no possibility of interference with or affront to state institutions.

If that was the Court's intention, or if it corresponds roughly with the intent of the majority that develops as the decisions accumulate, the nature of the larger policy served by circumscribing the role of federal courts remains difficult to discern. Principled attachment to the strong states'-rights rhetoric of the cases does not appear to extend beyond Chief Justice Burger and Justice Rehnquist. The merits always lie close beneath the surface of equity, however, and the language of states'-rights is sometimes a polite vehicle for expressing hostility to the substantive individual right asserted or to the party who asserts it. The contumacious debtor or the seller of doubtful entertainment may seem a more suitable person for the state's attention than a party coming before the Court with a claim that sounds doubly within the first amendment. That cannot be more than speculation, however. It is only slightly less speculative, albeit more credible, to link the Court's limitations upon equity jurisdiction with the general docket explosion in the federal courts. Ironically, so far as that concern may motivate some members of the Court, the Court remains aggressively conscientious in protecting diversity jurisdiction.[293] The congressional command in diversity remains absolute, despite the hostility of the Chief Justice to that category of the federal docket.[294] In sum, there is no single goal that can

292. That does not explain the affirmance of injunctive relief to Maynard; it is doubtful that this additional act of grace can be explained.

293. *See, e.g.*, Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 344 (1976) ("[T]he right to remove has never been dependent on the state of the federal court's docket"). The Court found that the district court judge had so far exceeded his authority that a writ of mandamus was issued against him. The contrast with the "judge-made doctrine" of *Younger* dismissal, as the Court described it in United States v. Bass, 404 U.S. 336, 349 (1971), is obvious. The day after *Thermtron* the Court handed down Rizzo v. Goode, 423 U.S. 362 (1976).

294. *See* W. Burger, *Annual Report on the State of the Judiciary*, ABA Mid-Winter Meeting, Philadelphia, Pa. (February 6, 1976), *reprinted in* 96 S. Ct. No. 9 at 5, March 1, 1976. *See generally* Burford v. Sun Oil Co., 319 U.S. 315, 336-48 (1943)(Frankfurter, J., dissenting); H.

reasonably be imputed to the entire Court that justifies or even adequately explains the *Younger* doctrine.

Whatever view may be taken of the Court's purposes, Our Federalism has taken on many of the attributes of substantive due process. It is a creature of pure judicial will, superior to statute and to constitutional and political philosophy developed over a century. There is a crucial difference, however, between substantive due process and this new natural law of federalism. No one can read *Lochner v. New York*[295] and complain that the Court was not being candid in offering reasoned elaboration from principles clearly stated, however obtuse or repugnant. What is clearly and cleanly done can be grasped, comprehended, and undone with equal clarity. Truth, as Bacon observed, can emerge from error, but not from confusion. Judicial enlightenment is subject to the same maxim. If the surmise is correct that Our Federalism is a doctrine merely of accommodation of a variety of agendas, no one of which can be relied upon regularly to command a majority, the Court will never be able to declare itself openly and clearly. It will remain locked in a stance of mean-spirited activism, advancing by stealth and footnotes, unless released by remedial legislation.

Perhaps the Court may be obliged simply by the chaos its pronouncements have inflicted on the lower federal courts to consider all of the implications of its policy, and to make the novel attempt to develop the doctrine in an articulate and systematic fashion. Until the Court attempts this, however, it remains immune both to reflection within its own chambers and to political scrutiny. The Court has adopted the posture of an activist usurper, which should astonish even the most scathing critics of the Warren Court. The present Court legislates as freely toward the diminution of the power of the federal judiciary to secure civil liberties as the Warren Court ever did on behalf of civil rights. There is, of course, a degree of hypocrisy in that position that the Court might find uncomfortable. It should be made still less comfortable by the thought that its own activism lacks even the grace of generosity and compassion.

FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 139-52 (1972); Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 128 (1968-1969).

In fiscal-year 1976 diversity cases accounted for 24% of the civil cases filed in federal district courts. Private civil rights cases made up 8%. ADMINISTRATIVE OFFICE OF THE FEDERAL COURTS, ANNUAL REPORT OF THE DIRECTOR, Pt. 2, at 122, 129 (1976).

295. 198 U.S. 45 (1905).